89-1161

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MICHIGAN AND
MICHIGAN PUBLIC SERVICE COMMISSION,
Petitioners,
v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission may legally authorize an interstate pipeline company to construct local facilities and provide natural gas directly to an industrial consumer in Michigan, thus bypassing existing local distribution facilities and applicable state law, when Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), expressly provides that federal jurisdiction does not extend to "the local distribution of natural gas or to the facilities used for such distribution".

LIST OF PARTIES

The parties before the United States Court of Appeals for the District of Columbia Circuit were:

Petitioners

The State of Michigan and Michigan Public Service Commission
Michigan Consolidated Gas Company

Respondent

The Federal Energy Regulatory Commission

Intervenors

A.P. Green Refractories Company
American Cyanamid Company
Amoco Production Company
Associated Gas Distributors
Association of Businesses Advocating Tariff Equity
Carnation Company
Central Illinois Light Company
Citizens Gas & Coke Company
Michigan Gas Utilities Company
National Steel Corporation
Panhandle Eastern Pipe Line Company

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") is reported as *Michigan Consolidated Gas Co.* v. *Federal Energy Regulatory Comm.*, 883 F.2d 117 (August 18, 1989), and is reproduced in the appendix at pages 1a-17a. The D.C. Circuit subsequently denied Michigan's Petition for Rehearing and Suggestion for Rehearing *En Banc* in unreported orders dated October 26, 1989, reproduced in the Appendix at pages 18a-19a.

The Initial Decision of the Administrative Law Judge is reported as *Panhandle Eastern Pipe Line Co.*, 38 FERC (CCH) ¶ 63,009 (1987) and is reproduced in the Appenduix at pages 93a-221a. The Federal Energy Regulatory Commission's ("FERC") Opinion and Order Affirming in Part, Reversing in Part and Modifying Initial

Decision is reported as Opinion No. 275-A, *Panhandle Eastern Pipe Line Co.,* 40 FERC (CCH) ¶ 61,219 (1987), Commissioner Stalon dissenting, 44 FERC (CCH) ¶ 61,410 (1988), and is reproduced in the Appendix at pages 65a-92a. The FERC's Opinion and Order Partially Granting and Denying Rehearing is reported as Opinion No. 275-B, *Panhandle Eastern Pipe Line Co.,* 42 FERC (CCH) ¶ 61,076 (1988), Commissioner Stalon dissenting, 44 FERC (CCH) ¶ 61,424 (1988), and is reproduced in the Appendix at pages 22a-64a. A further Order on rehearing is reported as *Panhandle Eastern Pipe Line Co.,* 42 FERC (CCH) ¶ 61,381 (1988) and is reproduced in the Appendix at pages 20a-21a.

JURISDICTION

The judgment sought to be reviewed was entered by the D.C. Circuit on August 18, 1989 and rehearing was denied on October 26, 1989. Jurisdiction in this Court exists by Certiorari pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the D.C. Circuit below existed pursuant to 15 U.S.C. § 717r(b).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Section 1(b) and Section 7(c) of the federal Natural Gas Act ("NGA"), 15 U.S.C. § 717(b); 15 U.S.C. § 717f(c), and Sections 1 and 2 of Michigan Act 69 of the Public Acts of 1929, Mich. Comp. Laws 460.501; 460.502. These provisions are set forth in the Appendix at pages 222a-224a.

STATEMENT OF THE CASE

On September 10, 1987, the FERC approved Panhandle Eastern Pipe Line Company's ("Panhandle") application for a certificate to: (1) transport natural gas owned by National Steel Corporation ("National") from Oklahoma and deliver it directly to National for use in its steelmaking plant near Detroit, Michigan; and (2) to con-

struct and operate facilities in Michigan to accomplish such service. In the administrative proceeding before the FERC, Michigan argued that FERC lacked the jurisdiction to approve Panhandle's application. Michigan also affirmatively asserted its jurisdiction under Michigan law, Act 69 of the Public Acts of 1929 ("Act 69"), Mich. Comp. Law 460.501 *et seq.*, which requires certification by the Michigan Public Service Commission ("MPSC") before a utility may render service in an area already served by another utility.[1] The Administrative Law Judge rejected Michigan's claim that the FERC lacked jurisdiction to authorize Panhandle's application but noted that "there might be some concurrent jurisdiction by Michigan with regard to the actual construction of the taps to connect the gas supply directly to National Steel". 38 FERC (CCH) ¶ 63,009 at 65,042. App. at 126a. FERC affirmed the Administrative Law Judge's initial decision, found the proposed service to be in the public convenience and necessity, and granted Panhandle a certificate pursuant to Section 7(c) of the NGA, 15 U.S.C. § 717f(c), to construct facilities and provide direct service to National. *See*, Opinion No. 275-A, *Panhandle Eastern Pipe Line Co.*, 40 FERC (CCH) ¶ 61,219 (1987), Appendix at 65a-86a.[2] Commissioner Stalon dissented,

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[1] The purpose of Act 69, according to the Michigan Supreme Court, was to enable the MPSC to prevent unnecessary multiplication of companies serving the same territory and to avoid wasteful duplication of facilities so as to keep investment at the lowest figure consistent with satisfactory service. *Huron-Portland Cement* v. *Michigan Public Service Comm.*, 351 Mich. 255; 88 N.W.2d 492 (1958).

[2] On September 14, 1987, following the issuance of FERC Opinion No. 275-A, Panhandle, National and Michigan Consolidated Gas Company all filed lawsuits in Michigan regarding the provision of direct natural gas service by Panhandle to National. Michigan intervened in each of the lawsuits, which were ultimately consolidated into a single case before the U.S. District Court for the Western District of Michigan. Although the District Court initially issued a preliminary injunction enjoining Panhandle from delivering gas di-

arguing that FERC's decision would encourage others to flee the local distribution systems since the direct service proposed by Panhandle did not induce constructive competition but rather constituted predatory competition. *See* 44 FERC (CCH) ¶ 61,410 (1988), Appendix at 87a-92a.

Michigan and others sought rehearing. In its rehearing petition, Michigan argued that Panhandle's delivery of gas directly to National and its construction of local facilities to accomplish that service, constituted the "local distribution" of natural gas and that the NGA specifically excludes FERC jurisdiction over the "local distribution" of natural gas. Nonetheless, FERC denied rehearing on January 27, 1988. *See*, Opinion No. 275-B, *Panhandle Eastern Pipe Line Co.*, 42 FERC (CCH) ¶ 61,076 (1988), Appendix at 22a-63a. In denying rehearing, FERC concluded that "irrespective of any local effects resulting from bypass, we believe that the transportation service at issue here concerns essentially Federal interests. . ." *Id.* at 61,349. App. at 55a. FERC thereafter denied a further rehearing request made by Michigan Consolidated Gas Company ("MichCon"). *See*, 42 FERC (CCH) ¶ 61,381 (1988), Appendix at 20a-21a.

Michigan and MichCon both filed petitions for review of FERC's orders. On August 18, 1989, the D.C. Circuit affirmed the FERC orders stating, "The arrangement in dispute involves merely interstate transportation of nat-

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rectly to National, it subsequently dissolved the injunction and held that Act 69 was preempted by the NGA. *See*, *National Steel Corp.* v. *Long*, 689 F.Supp. 729 (W.D. Mich. 1988). Michigan and others appealed to the U.S. Court of Appeals for the Sixth Circuit. Following the D.C. Circuit's decision in the case below, the Sixth Circuit affirmed the District Court's ruling on October 6, 1989 in *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (1989). Michigan's rehearing request was denied on November 3, 1989. Michigan is also filing a Petition for Certiorari to the U.S. Court of Appeals for the Sixth Circuit, since the matter on appeal there arises out of the same transaction as in this case and involves similar legal issues.

ural gas, a subject matter clearly within the Commission's [FERC's] jurisdiction." Appendix at 9a. The D.C. Circuit did not even discuss whether such service constitutes "local distribution", the regulation of which is reserved to the States by the NGA. The Court denied Michigan's subsequent Petition for Rehearing and Suggestion for Rehearing *En Banc* on October 20, 1989.

REASONS FOR GRANTING THE WRIT

I. THE POWER TO REGULATE BYPASS PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

This case involves a jurisdictional dispute between the FERC and the MPSC concerning the power to authorize the bypass of existing local distribution facilities by the construction of duplicative local facilities for the direct rendering of natural gas service to consumers by an interstate pipeline company. The FERC maintains that it may do so pursuant to its authority over the transportation of natural gas in interstate commerce. Michigan maintains that Section 1(b) of the Natural Gas Act expressly forbids the FERC from the exercise of such power and instead reserves it to the States. This is a legal question having widespread national implications since the rates and rate designs adopted by state utility commissions for the general ratepaying public will be fundamentally affected if FERC is allowed to authorize interstate pipelines to serve large industrial consumers thereby bypassing state-regulated local distribution utilities. *See generally* Broadman & Kalt, *How Natural is Monopoly? The Case of Bypass in Natural Gas Distribution Markets*, 6 Yale J. on Reg. 181 (1989); MacAvoy, Spulber & Stangle, *Is Competitive Entry Free? Bypass and Partial Deregulation in Natural Gas Markets*, 6 Yale J. on Reg. 209 (1989). Accordingly, Michigan submits that this case is sufficiently important to warrant review

by this Court. This conclusion is underscored when one considers both the analysis employed by the D.C. Circuit and its failure to consider applicable precedent of this Court.

II. THE D.C. CIRCUIT'S DECISION BELOW VIOLATES THE NATURAL GAS ACT'S DUAL REGULATORY SCHEME AND CONGRESSIONAL INTENT THAT THE REGULATION OF THE LOCAL DISTRIBUTION OF NATURAL GAS BE RETAINED BY THE STATES AND EXEMPTED FROM FEDERAL REGULATION.

The D.C. Circuit's decision fundamentally shifts the dividing line between state and federal authority over natural gas distribution in a manner inconsistent with the NGA's dual regulatory scheme. It ignores Congress' express mandate in Section 1(b) of the NGA that the local distribution of natural gas is exempt from federal regulation. Instead of preserving state regulation of local distribution as Congress intended, the D.C. Circuit's decision severly erodes state regulatory authority.

The D.C. Circuit erred fundamentally since the effect of its holding is that FERC's jurisdiction over the transportation of natural gas in interstate commerce includes the authority to regulate local distribution. Although Section 1(b) vests FERC with regulatory authority over transportation of natural gas in interstate commerce, this authority is strictly limited by the proviso in Section 1(b) of the NGA, 15 U.S.C. § 717(b), which expressly provides that FERC's jurisdiction over the transportation of natural gas in interstate commerce:

> . . . *shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution* or to the production of gathering of natural gas. (Emphasis added).

The term "local distribution" in Section 1(b) of necessity is a broad term incorporating the receipt of gas whether by transportation or sale.[3]

This Court recently reiterated the importance of the negative declaration in Section 1(b) noting, "Indeed Congress went so far in § 1(b) of the NGA, 15 U.S.C. § 717(b), as to prescribe not only 'the intended reach of the [federal] power but also [to] specif[y] the areas into which this power was not to extend'." *See Northwest Central Pipeline* v. *State Corp. Comm. of Kansas*, —— U.S. ——, 109 S.Ct. 1262, 1274 (1989). By so doing Congress expressly carved out a regulatory role for the States. *Id.*

The D.C. Circuit's interpretation of the NGA violates this Court's unequivocal determination that the NGA

[3] The concept of what constitutes "local distribution" is a reflection of Congress' intent in enacting the NGA that the States continue to regulate matters over which they previously had jurisdiction. In discussing H.R. 11662, the predecessor bill to the NGA, the Solicitor of the Federal Power Commission stated, "Moreover, the regulation of retail rates and matters incident to local distribution have been exclusively reserved . . . to the States . . . [n]or is any attempt made to exercise control over distribution facilities". *Hearings on H.R. 11662, before Subcommittee of the Committee on Interstate and Foreign Commerce, 74th Cong., 2nd Sess. 16-17 (1936).* In the report accompanying another predecessor bill, Congress again evidenced its intent that state control be retained in matters involving local gas service: "[The bill] does not apply to any other sale of natural gas or deprive a State of any lawful authority over the distribution and sale of natural gas locally". *H.R. Rep. No. 2651, 74th Cong., 2nd Sess. 1-2 (1936).* The intent not to disturb existing state regulation (such as Michigan's Act 69) was further embodied in a House Report which stated:

> The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation . . . . There is no intention to disturb the States in their exercise of such jurisdiction.

H.R. No. 709, 75th Cong., 1st Sess. 1-2 (1937).

"[t]ook no authority from State Commissions, and [was] so drawn as to complement and in no manner usurp state regulatory authority." *Federal Power Comm.* v. *Panhandle Eastern Pipe Line Co.,* 337 U.S. 498, 510 n. 15 (1949). Prior to the NGA's enactment in 1938, deliveries to consumers were consistently held to be subject to state regulation. *Missouri* v. *Kansas Gas Co.,* 265 U.S. 298, 307-09 (1924); *Pennsylvania Gas Co.* v. *Public Service Comm.,* 252 U.S. 23, 30-31 (1920); *Public Utilities Comm.* v. *Landon,* 249 U.S. 236, 245-46 (1919). This Court has recognized that it would be exceedingly incongruous for federal regulators to encroach on pre-existing state authority in the guise of exercising NGA powers:

> It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption.

Panhandle Eastern Pipe Line Co., v. *Public Service Comm. of Indiana,* 332 U.S. 507, 519 (1949).

Thus, this Court noted that to avoid encroachment on the powers Congress intended to reserve to the States, the Court must be careful that it does not by an "extravagant mode of interpretation push powers granted over transportation and rates so as to include production", which along with local distribution has been reserved to state jurisdiction. *Northwest,* 109 U.S. at 1275, citing *Federal Power Comm.* v. *Panhandle Eastern Pipe Line Co.,* 337 U.S. 498 (1949). Yet Congress' intent to preserve state regulation is swept aside by the D.C. Circuit's decision, an opinion which does not even address the question of whether Panhandle's delivery of gas directly to National constitutes the local distribution of natural gas within the meaning of Section 1(b) of the NGA.

III. THE D.C. CIRCUIT'S DECISION BELOW IS CONTRARY TO DECISIONS OF THIS COURT.

This Court, in at least two cases decided approximately 40 years ago, ruled that direct natural gas service to a consumer was subject to regulation by the state utility commission concerned. *See Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm.*, 341 U.S. 329 (1951) ("*Panhandle/Michigan*") and *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm. of Indiana*, ("*Panhandle/Indiana*"), 332 U.S. 507 (1947).

What is remarkable about the D.C. Circuit's decision is that it fails to even mention either *Panhandle/Michigan* or *Panhandle/Indiana* in its analysis, even though Michigan prominently argued their applicability to this case. This omission is all the more striking when one considers that this case, like the *Panhandle/Michigan* decision four decades ago, involved the same interstate pipeline company (Panhandle), the same local distribution utility (Mich Con), the same industrial corridor near Detroit and Michigan's assertion of the very same state law, Act 69. Nevertheless, despite these parallel facts and issues, the D.C. Circuit decided this case without a single reference to or any attempt to distinguish this Court's decision in *Panhandle/Michigan.*

In *Panhandle/Michigan,* this Court upheld Michigan's Act 69 certificating requirements, finding that the NGA did not cover direct sales by interstate pipelines. An integral component of this Court's decision was the emphasis placed on local interests, a factor critical to *both* Commerce Clause and NGA analyses:

> "Thus, not only would there be two utilities using local facilities to accommodate their distribution systems, but they would be seeking to serve the same industrial consumers. Appellant asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it

> would no doubt be reflected adversely in Consolidated's overall costs of service and its rates to customers whose only source of supply is Consolidated. This clearly presents a situation of 'essentially local' concern and of vital interest to the State of Michigan."

341 U.S. 333-334.[4]

The *Panhandle/Michigan* Court then concluded:

> "It does not follow that because appellant is engaged in interstate commerce it is free from state regulation or free to manage essentially local aspects of its business as it pleases. The course of this Court's decisions recognizes no such license. [citations omitted]. Such a course would not accomplish the effective dual regulation Congress intended, and would permit appellant to prejudice substantial local interests. This is not compelled by the Natural Gas Act or the Commerce Clause of the Constitution."

Id. at 337.

Without ever once mentioning *Panhandle/Michigan,* the D.C. Circuit simply concluded that the transaction in this case was subject to federal regulation "because the arrangement involves the transportation of natural gas in interstate commerce, not a local sale." Appendix at 9a. The consequence of the D.C. Circuit's decision is that it prejudices what clearly are substantial local interests by creating an untenable distinction between natural gas service directly to a consumer when accomplished by a pipeline company *sale,* as it was in *Panhandle/Michigan,* and natural gas service directly to a consumer when accomplished by pipeline company *transportation.* In terms of local interests, however, this is a distinction

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[4] *Panhandle/Michigan,* 341 U.S. at 333-34, unequivocally determines that tie-in facilities such as those proposed to be constructed between Panhandle and National are "local facilities." Indeed, the only purpose of such facilities is to facilitate local deliveries to end users such as National.

without a difference since the local interests present in a "sale" bypass are precisely the same as those present in a "transportation" bypass. Moreover, such a distinction contradicts Congress' goal in the NGA to bring about more effective local regulation. *See Panhandle/Indiana,* 332 U.S. 507, 519. In sum, if the D.C. Circuit's opinion is allowed to stand, the local control of "essentialy local interests" which this Court so carefully sought to preserve in *Panhandle/Michigan* becomes a fiction.

The D.C. Circuit's decision similarly ignored the fact that this case did not just involve transportation but involved the local construction in Michigan of new and duplicative facilities. Such construction is not necessary to accomplish the interstate transportation function. Rather, it is necessary solely for the local distribution of natural gas to National, the consumer. Furthermore, such construction resulted in the bypassing of existing facilities through which transportation could readily be accomplished. *See,* footnote 5.

Moreover, the D.C. Circuit's analysis does not take into account the restructuring of the natural gas industry which has occurred since the passage of the NGA in 1938. Historically, pipeline companies such as Panhandle would generally purchase gas at the "wellhead" from numerous producers, transport the commingled gas, and then resell it at wholesale to local distribution companies such as Mich Con, which in turn would sell and deliver the gas to the ultimate consumer. This was the structure in place in 1950 when *Panhandle/Michigan* was decided.

Beginning with the decline in oil prices relative to gas prices in the early 1980's, significant changes began to occur in the gas industry. One aspect of this change has been the "unbundling" or separation of the pipeline company's merchant function (that of being a seller of natural gas) from its transmission function (that of being a transporter). Thus, with unbundling, large volume consumers may arrange to purchase gas directly from the

producers and have it transported by a pipeline company.[5] In such circumstances, the pipeline company does not own the gas being transported.

Panhandle's direct delivery of natural gas to National is merely a part of "bundled" retail sales over which this Court stated the states had jurisdiction. *See Panhandle/Michigan.* What is being provided to National is a retail service to a consuming member of the public rather than a wholesale service. Although the mechanics of the transaction may have changed in a manner not envisioned by Congress when it enacted the NGA in 1938, all the hallmarks of a retail gas service being provided to an end using consumer remain.

It is inconceivable that the 75th Congress, which sought to protect and preserve state authority over natural gas distribution to consuming members of the public, would have intended that deliveries of natural gas to consumers be regulated differently solely on the basis of how the commercial transaction is structured by the parties to that transaction. A contrary conclusion would allow for the usurpation of state authority, a result which the Congress did not intend. *See, Federal Power Comm.* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 at 510 n. 15. Only Congress and not the FERC may transfer jurisdiction to regulate the local distribution of gas from the states to FERC. *See, Will* v. *Michigan*, —— U.S. ——; 109 S.Ct. 2304, 2308-9 (June 15, 1989) (Congressional intent to alter the federal-state balance must be "unmistakably clear"); *Louisiana Public Service Comm.* v. *FCC*, 476 U.S. 355, 374 (1986) ("[a]n agency may not confer power on itself").

By placing form over substance, the D.C. Circuit's decision has not only frustrated Section 1(b)'s express dec-

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[5] Similarly, in Michigan, the MPSC has allowed "unbundling" whereby an end user may have gas which it owns transported through the existing facilities of the local distribution utility thus abrogating the need for a direct connection to an interstate pipeline.

laration that the states regulate the local distribution and the construction of facilities for such distribution, but has ignored this Court's emphasis in *Panhandle/Michigan* on preserving local control over matters of essentially local concern.

IV. THE D.C. CIRCUIT UNDERMINES THE NATURAL GAS ACT'S DUAL REGULATORY SCHEME BECAUSE IT EFFECTIVELY AUTHORIZES THE FERC TO REVIEW THE PROPRIETY OF INTRASTATE RATES AND INTRASTATE RATE DESIGNS, MATTERS WHICH CONGRESS RESERVED EXCLUSIVELY TO THE STATES.

The D.C. Circuit's decision undermines the dual regulatory scheme established by the NGA since it effectively authorizes the FERC to engage in a review of the propriety of intrastate rates and rate designs which are the exclusive province of the State commissions.

In finding that Panhandle's delivery of natural gas to National should be authorized, the FERC determined: (1) that the state-authorized rate charged by Mich Con to large industrials (including National) is improper; and, (2) that any cost shifting resulting from the direct service to other classes is justified. *See*, Administrative Law Judge's Initial Decision, 38 FERC (CCH) ¶ 63,009 at 65,043, Appendix at 129a-130a which was subsequently adopted by the FERC in Opinion No. 275-A, 40 FERC (CCH) ¶ 62,219, Appendix at 65a-86a. The FERC made this decision despite the fact that the state commission in a more complete record may have determined exactly the opposite, based on other considerations, not germane to FERC's limited inquiry.[6]

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[6] FERC made this decision without any benefit of the extensive rate case procedures which the MPSC uses to establish Mich Con's rates, both with respect to sales and transportation service. These procedures provide for widespread public notice in Michigan, an accessible forum before the MPSC for all local parties to participate, formal contested hearings under Michigan's Administrative Proce-

Finally, National, like any other Michigan consumer, has the ability to purchase gas anywhere in the United States, Canada, or elsewhere and have it transported to it through *existing* facilities in Michigan without the need for or the construction of additional duplicative facilities.[7] Thus, while the FERC may undertake efforts to promote competition within the sphere of its own authority, it may not do so at the expense of state regulatory authority over local distribution which the Congress specifically preserved in Section 1(b) of the NGA.

PRAYER FOR RELIEF

WHEREFORE, this Court should grant Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit and should hold that the Federal Energy Regulatory Commission exceeded its jurisdiction under the Natural Gas Act when it purported to authorize the local distribution of natural gas and the construction of facilities for such distribution.

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dures Act of 1969, 1969 P.A. 306, Mich. Comp. Laws 24.201 *et seq.*, the MPSC's Rules of Practice and Procedure, Michigan Administrative Code R 460.11 *et seq.* and judicial review by *right,* of all MPSC rate decisions, pursuant to Mich. Comp. Laws 462.26. Thus, even if National were aggrieved by any MPSC rate decision, fully adequate state remedies exist to deal with such matters, without FERC attempting to impose itself as the review authority, all with a sparse FERC evidentiary record regarding such local ratemaking matters.

[7] *See* footnote 5, *supra.*

Respectfully submitted,

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Dated: January 24, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 19, 1989 Decided August 18, 1989

No. 88-1062

MICHIGAN CONSOLIDATED GAS COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

NATIONAL STEEL CORPORATION,
CITIZENS GAS & COKE UTILITY,
PANHANDLE EASTERN PIPE LINE COMPANY,
AMERICAN CYANAMID COMPANY,
A.P. GREEN REFRACTORIES COMPANY,
AMOCO PRODUCTION COMPANY,
MICHIGAN GAS UTILITIES COMPANY,
CENTRAL ILLINOIS LIGHT COMPANY,
CARNATION COMPANY,
ASSOCIATION OF BUSINESS ADVOCATING TARIFF EQUITY,
Intervenors

No. 88-1199

STATE OF MICHIGAN AND MICHIGAN PUBLIC SERVICE COMMISSION,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

NATIONAL STEEL CORPORATION,
CITIZENS GAS & COKE UTILITY,
PANHANDLE EASTERN PIPE LINE COMPANY,
MICHIGAN CONSOLIDATED GAS COMPANY,
AMOCO PRODUCTION COMPANY,
MICHIGAN GAS UTILITIES COMPANY,
CENTRAL ILLINOIS LIGHT COMPANY,
Intervenors

No. 88-1362

MICHIGAN CONSOLIDATED GAS COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

CITIZENS GAS & COKE UTILITY,
PANHANDLE EASTERN PIPE LINE COMPANY,
NATIONAL STEEL CORPORATION,
MICHIGAN GAS UTILITIES COMPANY,
A.P. GREEN REFRACTORIES COMPANY,
Intervenors

Petition for Review of Orders of the
Federal Energy Regulatory Commission

Jeffrey M. Petrash with whom *James H. Holt* was on the brief, for petitioner Michigan Consolidated Gas Company in No. 88-1062 and No. 88-1362 and intervenor in No. 88-1199.

Henry J. Boynton, Assistant Attorney General, State of Michigan, with whom *Frank J. Kelley*, Attorney General, State of Michigan, *Louis J. Caruso*, Solicitor General, and *Don L. Keskey*, Assistant Attorney General, State of Michigan, were on the brief, for petitioners State of Michigan and Michigan Public Service Commission in No. 88-1199.

Dwight C. Alpern, Attorney, Federal Energy Regulatory Commission with whom *Catherine C. Cook*, General Counsel, and *Jerome M. Feit*, Solicitor, Federal Energy

Regulatory Commission, were on the brief, for respondent in Nos. 88-1062, 88-1199 and 88-1362. *John Estes* also entered an appearance, for respondent Federal Energy Regulatory Commission.

William H. Penniman with whom *Raymond N. Shibley* and *Bruce W. Neely* were on the joint brief, for intervenors Panhandle Eastern Pipe Line Company and National Steel Corporation in Nos. 88-1062, 88-1199 and 88-1362. *Brian D. O'Neill* also entered an appearance, for intervenor Panhandle Eastern Pipe Line Company. *Douglas H. West* also entered an appearance, for intervenor National Steel Corporation.

Steven M. Sherman and *William P. Diener* entered appearances, for intervenor Citizens Gas & Coke Utility in Nos. 88-1062, 88-1199 and 88-1362.

Nicholas W. Fels entered an appearance, for intervenor American Cyanamid Company in No. 88-1062.

Lyndon C. Taylor and *Paula M. Young* entered appearances, for intervenor A.P. Green Refractories Company in Nos. 88-1062 and 88-1362.

Kevin M. Sweeney entered an appearance, for intervenor Amoco Production Company in Nos. 88-1062 and 88-1199.

John R. Schaefgen, Jr. entered an appearance, for intervenors Michigan Gas Utilities Company and Central Illinois Light Company in Nos. 88-1062, 88-1199 and 88-1362.

Richard A. Oliver entered an appearance, for intervenor Carnation Company in No. 88-1062.

Glen S. Howard entered an appearance, for intervenor Association of Businesses Advocating Tariff Equity in No. 88-1062.

Frederick Moring and *Herbert J. Martin* were on the brief, for amicus curiae Associated Gas Distributors in

Nos. 88-1062, 88-1199 and 88-1362, urging review. *M. Lisanne Crowley* also entered an appearance, for amicus curiae Associated Gas Distributors in No. 88-1062.

Before RUTH B. GINSBURG, D.H. GINSBURG, and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: In the orders we review, the Federal Energy Regulatory Commission ("FERC" or "the Commission") permitted Panhandle Eastern Pipe Line Company ("Panhandle") to transport natural gas from Oklahoma directly to National Steel Corporation's ("National") Great Lakes Steel Division plant in Michigan, bypassing the local distribution network of Michigan Consolidated Gas Company ("MichCon"). MichCon, together with the State of Michigan and the Michigan Public Service Commission (collectively "MPSC"), petition for review, arguing that FERC exceeded its jurisdiction and incorrectly construed section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c) (1982) ("NGA" or "the Act"). Finding no error, we deny the petition and uphold the orders.

I. BACKGROUND

At its Great Lakes Steel Division plant in Michigan, National has for many years been an end-user customer of MichCon, a local distribution company ("LDC"). Prior to March 24, 1985, National had purchased all its natural gas requirements from Michigan. On that date, MichCon commenced transportation on its system and National, while continuing to deal with the LDC, transported 100% of its gas, purchased from third parties, on the MichCon system. As a Michigan intrastate LDC, MichCon provided transportation at rates set by MPSC.

As it happens, an interstate pipeline owned by Panhandle transverses National's Michigan property. National and Panhandle negotiated an arrangement by which Panhandle would add fittings and pipes to tap its

line at the National location, thereby making it possible for Panhandle to transport directly to National gas purchased by National in Oklahoma. The arrangement permitted National to bypass the MichCon local network and to transport its gas at interstate rates, lower than those set by MPSC for gas transported on MichCon's system. The new connection would cost Panhandle approximately $188,000, which National agreed to reimburse.

As an interstate transporter of natural gas, Panhandle applied for a certificate of public convenience and necessity from FERC under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to tap the line and provide interruptible transportation service to National. *See Abbreviated Application for Certificate of Public Convenience and Necessity, In the Matter of Panhandle Eastern Pipe Line Co.*, FERC Docket No. CP86-232 (Dec. 12, 1985), Joint Appendix ("J.A.") at 59a-60a. FERC consolidated this application with other related proceedings and, *inter alia*, directed an administrative law judge ("ALJ") to resolve several disputed issues of material fact. *See Order Consolidating Applications and Complaint and Prescribing Hearing*, FERC Docket Nos. CP86-232, -486, -504, -551, -573, -598, -584, -663 (Sept. 16, 1986) at 13, J.A. at 137a, 148a. FERC ordered the ALJ to "expedite[] [the] evidentiary hearing" and render a decision within ninety days due to "new economic pressures [for pipeline companies] to adapt, and to adapt quickly, to changing market conditions." [1] *Id.* at 12-13, 16, J.A. at 148a-49a, 152a.

The ALJ found that Panhandle's proposed transportation service would serve the public convenience and necessity. *Panhandle Eastern Pipe Line Co.*, 38 F.E.R.C. ¶ 63,009 at 65,046 (1987). While FERC policy favors

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[1] FERC amended the period to grant the ALJ an additional thirty days. *Order Amending Order Consolidating Applications and Complaints*, FERC Docket No. CP86-232, *et al.* (Sept. 26, 1986), J.A. at 177a.

service to industrial customers through LDCs such as MichCon rather than through pipelines, the ALJ noted that the preference "is conditional and does not apply if economic considerations preclude it." *Id.* at 65,040. In the present case, the ALJ concluded that economic conditions in fact precluded the preference. The ALJ then undertook an extensive analysis of the particular considerations relevant to the Panhandle application, including factors cited by Panhandle and National Steel in favor and those cited by MichCon and MPSC against. He then concluded that, on balance, the proposed service was in the public convenience and necessity. *Id.* at 65,042-44.

On appeal, the Commission (with one dissent) adopted the ALJ's findings and conclusions and granted Panhandle's request for a certificate of public convenience and necessity. Opinion No. 275-A; *Opinion and Order Affirming in Part, Reversing in Part, and Modifying Initial Decision, Panhandle Eastern Pipe Line Co.*, 40 F.E.R.C. ¶ 61,220 (1987) (reversing and modifying only as to matters not material to the present petition for review). FERC reiterated the ALJ's analysis of the limited nature of the preference for LDC service to industrial end-users, stating that "we have made clear that we would not rigidly follow that rule, but rather [would] examine the individual circumstances of each [case] before applying the policy." *Id.* at 61,751.

On January 27, 1988, the Commission denied rehearing, rejecting MSPC's claim of exclusive jurisdiction to authorize the bypass. The Commission held that Panhandle's proposed service constituted transportation in interstate commerce, not local distribution. Opinion No. 275-B; *Opinion and Order Partially Granting and Denying Rehearing, Panhandle Eastern Pipe Line Co.*, 42 F.E.R.C. ¶ 61,076, at 61,348-49 (1988). On March 28, 1988, the Commission rejected MichCon's request for rehearing of Opinion No. 275-B. *Order Dismissing Request*

for Rehearing, Panhandle Eastern Pipe Line Co., 42 F.E.R.C. ¶ 61,381, at 62,129 (1988). MichCon and the Michigan state parties all petitioned this Court for review,[2] claiming that the Commission overstepped its jurisdiction by authorizing the bypass, departed from its long-standing policy without a reasoned explanation, reached conclusions supporting its grant of the certificate without substantial evidence, and denied petitioners due process of law. For the reasons set out below, we find that none of these assertions merits granting the petition for review.

II. Analysis

Our review of the Commission's action is subject to section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982). *East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 937 (D.C. Cir. 1988); *Maryland People's Counsel v. FERC*, 761 F.2d 768, 774 (D.C. Cir. 1985). We must uphold the Commission's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Under the familiar arbitrary and capricious standard, our "scope of review . . . is narrow and [we should] not . . . substitute [our] judgment for that of the agency," but rather should determine " 'whether the decision was based on a consideration of the relevant factors and

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[2] MichCon also filed suit in the United States District Court for the Western District of Michigan to enjoin Panhandle from constructing facilities and providing service to National, as authorized by the Commission, without complying with a Michigan statute, 129 Mich. Pub. Acts 69, Mich. Comp. Laws §§ 460.501 *et seq.*; Mich. Stat. Ann., *et seq.* The district court granted summary judgment for the defendants, concluding that the Michigan act had been preempted by the NGA and, therefore, that MPSC had no authority to require a state certificate for the Commission-approved bypass. *National Steel Corp. v. Long*, 689 F. Supp. 729, 738 (W.D. Mich), *appeal docketed*, No. 88-1774 (6th Cir. Aug. 3, 1988). An appeal to the Sixth Circuit is pending at the time of this writing.

whether there has been a clear error of judgment.'" *Motor Vehicle Mfrs, Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974); other citation omitted). *See also Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851, 1860 (1989); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Maryland People's Counsel*, 761 F.2d at 774. As part of this task we must determine whether "the agency . . . articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 29 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). With these standards in mind, we proceed to analyze each of the issues raised by petitioners.

A. *Commission Jurisdiction*

Petitioners argue that FERC overstepped its statutory jurisdiction under section 1(b) of the NGA, 15 U.S.C. § 717(b), which states that the Act does "not apply . . . to the local distribution of natural gas." Petitioners contend that FERC violated the dual state-federal regulatory scheme over natural gas by interfering in a question of local distribution of gas involving "essentially local concerns." Joint Opening Brief of Petitioners State of Michigan and Michigan Pub. Serv. Comm'n at 8. FERC held in Opinion 275-B that it has exclusive jurisdiction over this bypass arrangement, stating that states are "free to regulate the rates and review the purchasing practices of [local] distributors under their jurisdiction" but could not "frustrate individual [interstate] pipeline transactions" like this arrangement, "irrespective of local effects." Opinion No. 275-B, 42 F.E.R.C. at 61,349. Without determining the precise boundaries of FERC and state regulatory jurisdiction, we have no difficulty in

holding that FERC has jurisdiction over the particular arrangement involved in the present controversy.

The arrangement in dispute involves merely interstate transportation of natural gas, a subject matter clearly within the Commission's jurisdiction. Congress defined the federal regulatory jurisdiction over natural gas in 15 U.S.C. § 717(b) as including "the transportation of natural gas in interstate commerce." *Id.* On the other hand, the jurisdiction "shall not apply to any other transportation or sale of natural gas or to local distribution of natural gas." *Id.* The present arrangement is the subject of federal regulation pursuant to the NGA because the arrangement involves the transportation of natural gas in interstate commerce, not a local sale. It is undisputed that title to the gas passes in Oklahoma, not Michigan. Panhandle, the transporter of the gas, is not a party to the sale. Panhandle's role under the arrangement is simply to transport National's gas from one state to another across several intervening states. It is hardly conceivable that a transaction could fit more neatly into the category of "transportation of natural gas in interstate commerce."

Petitioners call our attention to *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), in support of their plea for a contrary result. While we commend this case to the interested reader for its thorough discussion of the history of the delineation between federal and state regulation of energy transactions, *id.* at 377-80, we do not find it to compel the result petitioners seek. In *Arkansas Electric*, the Supreme Court determined only that a state assertion of regulatory jurisdiction over the wholesale rates charged by an electric cooperative to its member retail distributors within the same state was not preempted by the enabling statutes of FERC. *Id.* at 384-89. In no sense did the Court establish any sort of inverse preemption, allocating to states a power to exclude gas transactions

involving industrial end-users where the transaction involved is interstate transportation. On that subject, the law would appear to be the same after *Arkansas Electric* as before. That is, Congress meant to make the Commission "jurisdiction plenary and extend[] it to all wholesale sales in inter-state commerce except those which Congress has made explicitly subject to regulation by the states." *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964). While the sale in the present case is retail rather than wholesale, the sale of gas in Oklahoma is not the subject matter of the transportation arrangement between Panhandle and National approved by the Commission. Transportation in interstate commerce is clearly a subject for federal regulation under 15 U.S.C. § 717(b). To what extent this works a preemption of state regulation is not the subject of the present petition for review, and we need not discuss it.[3]

B. *Reasoned Explanation of Bypass Question*

Petitioners contend that FERC departed from a longstanding policy favoring local distribution over interstate

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[3] We express no opinion on the finding of preemption in *National Steel Corp. v. Long*, 689 F. Supp. 729, a matter which is presumably before the Sixth Circuit on appeal.

We also find it unnecessary to determine whether an agency's interpretation of its jurisdiction under the statute it enforces is subject to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), because the Commission's view is sustainable whether or not we afford such deference. *Compare Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S. Ct. 2428, 2443 (1988) (Scalia, J., concurring in the judgment) (arguing *Chevron* deference applies to agency interpretation of its statutory jurisdiction) *with id.* at 2446-47 (Brennan, J., dissenting) (arguing it does not).

The notion that *Chevron* deference should be afforded an agency's interpretation of its statutory jurisdiction has been the subject of skeptical comment. *See, e.g., Kokechik Fisherman's Ass'n v. Secretary of Commerce*, 839 F.2d 795, 807 (D.C. Cir. 1988) (Starr, J., dissenting); *New York Shipping Ass'n v. Federal Maritime Comm'n*, 854 F.2d 1338, 1363 n.9 (D.C. Cir. 1988).

bypass without a reasoned explanation. We hold that the Commission did provide a reasoned explanation for its departure and, furthermore, clarified that the alleged "policy" is, in fact, merely a surmountable "preference."

It is well established that an agency may not " 'casually ignore its own past decisions' " and that " '[d]ivergence from agency precedent demands an explanation.' " *Cross-Sound Ferry Servs., Inc. v. ICC*, 873 F.2d 395, 398 (D.C. Cir. 1989) (citations omitted). While " '[a]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed,' " *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)), "where a particular agency action does not appear to be inconsistent with prior decisions, the agency explanation need not be elaborate," *id.* at 873 (citing *United Mun. Distribs. Group v. FERC*, 732 F.2d 202, 211 (D.C. Cir. 1984) (sufficiently different circumstances from prior decision justified deviation from precedent via "laconic" explanation); *West Coast Media, Inc. v. FCC*, 695 F.2d 617, 621 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 816 (1983) (recitation of factual differences sufficient to deviate from prior case)).

In the instant case, FERC has more than sufficiently explained its deviation from policy, if it be that. Both the ALJ, 38 F.E.R.C. at 65,040, and the Commission, 40 F.E.R.C. at 61,751-52, noted that the policy was merely a preference rebuttable on a case-by-case basis. *See Panhandle Eastern Pipe Line Co.*, 29 F.E.R.C. ¶ 61,338 at 61,709 (1984); *Missouri Edison Co.*, 47 F.P.C. 849, 851, *reh'g denied*, 47 F.P.C. 1112 (1972), *rev'd on other grounds*, 479 F.2d 1185 (D.C. Cir. 1973); *Southern Natural Gas Co.*, 25 F.P.C. 925, 927, *reh'g denied*, 25 F.P.C. 1231 (1961). The ALJ proceeded to analyze the economic conditions of all parties involved in the bypass. *See* 38

F.E.R.C. at 65,041. After considering National's poor competitive position *vis-a-vis* foreign steel manufacturers, the ALJ concluded that National would reduce energy costs one way or another—but, through whatever means chosen, National would either significantly reduce or terminate its dealings with MichCon. 38 F.E.R.C. at 64,043. Thus, any harm to MichCon from the bypass would ultimately occur regardless of whether FERC issued the certificate of public convenience and necessity. Finally, weighing the inevitable—that is, National's switch to an alternative supplier or source of fuel—against the interim benefits to MichCon from continuing to supply natural gas to or transport gas for National, the ALJ found the preference favoring local distributors surmounted—especially considering that the Great Lakes facility employs 5,500 employees and National company-wide employs 12,000, all of whose jobs could be endangered by any significant termination of operation by National. 38 F.E.R.C. at 63,043. The Commission adopted the ALJ's findings.[4] 40 F.E.R.C. at 61,752.

This reasoning hardly appears to " 'swerve' from . . . prior decisions." *Hall*, 864 F.2d at 873. Rather, it appears to present the quintessential situation in which the presumption was designed to be surmounted; insistence on LDC participation could, the Commission determined, cause significant economic harm to National and to the local economy supported by National's Great Lakes Steel Division facility. *See Missouri Edison Co. v. FPC*, 479 F.2d 1185, 1189 (D.C. Cir. 1973) (considering in public-interest calculus the effects on the local economy, particularly the loss of 500 jobs, if an end-user of natural gas was forced out of business due to high energy costs). Accordingly, we conclude that the Commission committed no unexplained departure from prior practice.

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[4] FERC added that MichCon may in the long term actually be able to reduce rates, since the immediate availability of excess pipeline capacity may make it unnecessary to build additional pipelines in the future to meet growth in demand.

FERC also adds that it has a long-standing policy favoring competition. The Commission contends that we cannot require FERC to enforce the rebuttable presumption favoring LDC's over the stronger policy favoring competition. Essentially, FERC argues that a competitive gas market has developed at the wellhead (producer's end of the pipeline) due to deregulation. That competitive market, however, has not been passed through to the consumer because of intervening state regulation. Until prices are reduced at the consuming end and consumers are permitted to purchase more gas, the surplus at the producing end could depress the domestic drilling industry. *See Panhandle*, 38 F.E.R.C. at 65,046-47 (citing Order No. 436, *Regulation of Natural Gas Pipeline After Partial Wellhead Decontrol*, 50 Fed. Reg. 42,408 (1985) (codified at 18 C.F.R. Parts 2, 157, 250, 284, 375 & 381 (1988)), *aff'd in part and vacated and remanded in part, Associated Gas Distribs. v. FERC*, 824 F.2d 981, 993 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1468 (1988) ("AGD")). MichCon responds that FERC's "competitive model" is based on a faulty assumption—that the natural gas market is competitive—although it has been regulated for the last fifty years.

Whether FERC's model is "faulty" or not, which we do not decide, we are not at liberty to replace FERC's economic reasoning, supported by its technical expertise, with our own. *See generally Marsh v. Oregon Natural Resources Council*, 109 S. Ct. at 1861 (where "analysis of the relevant [factual evidence] 'requires a high level of technical expertise,'" courts are compelled to "defer to 'the informed discretion of the responsible federal agencies'") (citations omitted).

MichCon also contends that an essential link in FERC's "departure" from its preference for LDCs—National's intent to pursue and obtain an alternative supplier or alternative source of energy—is not supported by substantial evidence. MichCon states that the sole evidence in

support of this conclusion is direct testimony of one of National's officials. MichCon contends that the "mere description of alternatives . . . does not [make them] serious proposals." Brief for Petitioner MichCon at 40. We do not agree.

Section 19 of the NGA, 15 U.S.C. § 717r(b), states that factual "finding[s] of the Commission . . ., if supported by substantial evidence, shall be conclusive." We have previously stated that "this is no more than a recitation of the application of the 'arbitrary and capricious' standard to factual findings." *Maryland People's Counsel*, 761 F.2d at 774 (citing *Association of Data Processing Serv. Orgs. v. Board of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 681-86 ((D.C. Cir. 1984)). *See also Marsh*, 109 S. Ct. at 1861 & n.23 (applying arbitrary and capricious standard instead of reasonableness standard to a factual dispute); *East Tennessee*, 863 F.2d at 937. It is also quite clear FERC may make predictions—"[m]aking . . . predictions is clearly within the Commission's expertise" and will be upheld if "rationally based on record evidence." *East Tennessee*, 863 F.2d at 938-39 (citing *AGD*, 824 F.2d at 1008). Moreover, "agencies do not need to conduct experiments in order to rely on reasonable economic propositions." *AGD*, 824 F.2d at 1008-09.

Thus, we must determine if the Commission's reliance on that single source was arbitrary and capricious. That evidence comes from a single source does not alone make it either invalid or insubstantial. The ALJ had record evidence that National was "serious in its intention to eliminate or reduce its reliance on MichCon." 38 F.E.R.C. at 65,043. Likewise, the ALJ had record evidence that National was "currently negotiating" and "ha[d] been seriously exploring . . . since 1983" a contract to purchase Canadian natural gas, transportable by means other than MichCon facilities. *Id.* at 65,044.

From this evidence the ALJ drew rational conclusions adopted by the Commission that National was in a serious steel war with foreign steel makers and had to reduce production costs. The Commission credited National's attempts to secure alternative sources of fuel, even though National had not at the time actually secured such an alternative source. Furthermore, maintenance of the *status quo* could, in the ALJ's determination, result in the loss of several thousand jobs if National could not otherwise reduce production costs. These findings are not arbitrary but had substantial basis in the record. From these factual findings, it was reasonable for FERC to predict that National would ultimately find an alternative source, or, if it did not, could ultimately be forced out of business or forced to lay off employees. We hold that the Commission's decision is supported by substantial evidence and is neither arbitrary nor capricious.

C. *Fair Proceedings and Due Process*

Finally, petitioners contend that they were denied due process of law because the expedited proceedings were limited to ninety days and because of the ALJ's denial, upheld by FERC, 40 F.E.R.C. at 61,753-54, of MichCon's request to introduce portions of discovery depositions of three National Steel officials.

We lack jurisdiction over petitioners' first claim, that the expedited proceedings denied them due process, because petitioners failed to raise it on rehearing before FERC.[5] *See NGA* § 19(a), 15 U.S.C. § 717r(a); *ASARCO, Inc. v. FERC*, 777 F.2d 764, 771 (D.C. Cir. 1985); *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 243 (D.C. Cir.), *cert. denied*, 449 U.S. 1061 (1980).

Petitioners next argue that the ALJ erroneously relied on discovery rules not in effect to deny admission of the

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[5] *See Request for Rehearing of Michigan Consolidated Gas Company, Panhandle Eastern Pipe Line Co., et al.*, F.E.R.C. Docket Nos. CP86-232, -486, -504, -551, -573, -598, -645, -655, -660, -670, -671 (Oct. 9, 1987) at 10, J.A. at 1071, 1080a.

depositions when the rules in effect at the time of the hearing "did not include specific rules governing discovery." *See* Brief for MichCon at 47. FERC responds that under Commission practice parties are to file witnesses' written direct testimony and exhibits prior to the hearing, and here, in particular, the ALJ established a procedural schedule for the filing of all direct exhibits and testimony and for the hearing for cross-examination. Brief for FERC at 67 (citing *Order Setting Procedural Schedule, Panhandle Eastern Pipe Line Co.,* F.E.R.C. Docket Nos. CP86-232 (Sept. 30, 1986), J.A. at 178a. MichCon, FERC contends, should have filed these depositions with its written testimony consistent with the ALJ's schedule on November 5, 1986. Instead, MichCon filed them on November 24 at the beginning of the evidentiary hearing. Accordingly, the ALJ denied their admission.

When a party is on reasonable notice as to the dates and times for hearings and for filings in an administrative proceeding, we are hard pressed to hold that the administering agency acted arbitrarily or capriciously in denying admission of materials untimely filed. Although not an invariable rule, "[c]ourts generally accord agencies broad discretion in fashioning hearing procedures." *Lyons v. Barrett,* 851 F.2d 406, 410-11 (D.C. Cir. 1988) (citing *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.,* 435 U.S. 519, 543 (1978)). *Cf. TRT Telecomm. Corp. v. FCC,* No. 88-1357, slip op. at 38 n.20 (D.C. Cir. May 23, 1989) ("we cannot, absent congressional instruction, impose our own notions of the 'best' procedural format"); *Kansas P. & L. Co. v. FERC,* 851 F.2d 1479, 1484 (D.C. Cir. 1988) (FERC "has broad discretion . . . to decide what procedures to use in fulfilling its statutory responsibilities") (citations omitted).

Whether or not FERC relied on a Commission rule that had not yet taken effect, we do not find its denial of admission of the depositions arbitrary or capricious. *See Harter v. United States,* 871 F.2d 1140, 1142 (D.C. Cir. 1989) (plaintiff "faces [an] uphill challenge of dem-

onstrating that the [agency's] determination . . . is founded on an impermissible view of the [agency's] procedural discretion in admitting evidence in [the subject] proceeding") (citations omitted). The important point is that petitioners were aware of the ALJ-imposed deadlines —the times and dates that the depositions were due—and failed to comply. As we recently noted in the context of a party's failure to comply with an agency's announced pleading cycle,

> [n]ot only are we mindful that rules are rules . . . and that rules bind litigants before the agency as well as the agency itself, but those of us who are privileged to serve in courthouses should be the very last to fault an agency's effort to bring orderliness and predictability (and finality) to the litigation process.

Llerandi v. FCC, 863 F.2d 79, 87 (D.C. Cir. 1988) (citations omitted). We cannot hold the ALJ or FERC responsible for petitioners' omission. Thus, we hold that petitioners have not demonstrated that they were not provided fair proceedings and adequate due process.

III. Conclusion

For the above stated reasons, we conclude that FERC did not act arbitrarily or capriciously in granting Panhandle a certificate of convenience and necessity to transport for and deliver natural gas to National and thereby to bypass MichCon's local distribution network. We deny the petition for review and uphold the three orders.[6]

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[6] Petitioners raise additional issues which we need not address becauese the issues were either not raised in their application for rehearing, 15 U.S.C. § 717r(a), or have been mooted by other acts of the parties.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1062

MICHIGAN CONSOLIDATED GAS COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

and Consolidated Cases

Before: Ruth B. Ginsburg, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

[Filed Oct. 26, 1989]

Upon consideration of Petitioners' Petition for Rehearing, filed October 2, 1989, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1062

MICHIGAN CONSOLIDATED GAS COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

and Consolidated Cases

Before: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

[Filed Oct. 26, 1989]

Petitioners' Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Silberman did not participate in this order.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. CP86-232-027 et al.

PANHANDLE EASTERN PIPE LINE COMPANY

ORDER DISMISSING REQUEST FOR REHEARING

(Issued March 28, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, and Charles A. Trabandt.

On February 26, 1988, the Michigan Consolidated Gas Company (MichCon) filed a timely pleading styled as a request for rehearing of Opinion No. 275-B. *Panhandle Eastern Pipe Line Co. et al.*, Docket No. CP86-232-008 *et al.*, 42 FERC ¶ 61,076 (1988) (Opinion and Order Partially Granting and Denying Rehearing). MichCon requests rehearing of a portion of the order that addresses an issue raised by the Michigan Public Service Commission (MPSC), that is, whether we have jurisdiction over gas transported in interstate commerce by Panhandle Eastern Pipe Line Company for an end-user, National Steel Corporation, despite the fact that such a service would by-pass MichCon, the local distribution company.

In his initial decision, the judge correctly addressed this same issue raised by the MPSC and concluded that we have jurisdiction over the transportation of the gas in interstate commerce. 38 FERC ¶ 63,009, at pp. 65,041-47 (1987). In Opinion No. 275-A, we affirmed the judge.

40 FERC ¶ 61,220, at pp. 61,751-54 (1987). Nevertheless, the MPSC raised the same issue on rehearing. In Opinion No. 275-B, on rehearing of Opinion No. 275-A, we once again affirmed the conclusion that we have jurisdiction. 42 FERC at pp. 61,247-50. In response to the MPSC's request for rehearing, we further elucidated our reasoning but did not alter our prior determination. Therefore, in essence, MichCon requests rehearing of the rationale supporting a jurisdictional determination we have consistently made throughout the course of these proceedings. Accordingly, because a rehearing request does not lie under these circumstances, we dismiss MichCon's request. *Cf. Northwest Pipeline Corp.*, Docket No. CP77-378, 5 FERC ¶ 61,031 (1978) (dismissing an application for reconsideration of an order denying rehearing).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. CP86-232-008

PANHANDLE EASTERN PIPELINE COMPANY

Opinion No. 275-B

OPINION AND ORDER PARTIALLY GRANTING AND DENYING REHEARING

(Issued January 27, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

This order grants in part, and denies in part, the requests for rehearing of Opinion Nos. 275 [1] and 275-A,[2] clarifies Opinion No. 275-A, and denies a request for a partial stay of Opinion No. 275-A.

I. Background

On June 20, 1986, the Independent Petroleum Association of Mountain State (IPAMS) filed in Docket No. CP86-584-000 a formal complaint, pursuant to Rule 20e of our Rules of Practice and Procedure, against Panhandle Eastern Pipe Line Company (Panhandle).[3] The com-

[1] 39 FERC ¶ 61,274 (1987).

[2] 40 FERC ¶ 61,220 (1987).

[3] *See* 18 C.F.R. § 385.206 (1987) (regulation concerning complaints). Originally, IPAMS filed complaints against both Panhandle and Colorado Interstate Gas Company (CIG). However, the complaint against CIG was settled. *See Panhandle Eastern Pipe Line Co. et al.*, Docket No. CP86-232-000 *et al.*, 37 FERC ¶ 61,303

plaint alleged that Panhandle had engaged in unduly discriminatory conduct which created an anticompetitive and undue advantage for its marketing affiliate, Panhandle Trading Company (PTC). Subsequently, we consolidated the complaint with twelve applications for transportation certificate authorization filed by Panhandle and set the proceeding for expedited hearing.[4] On January 22, 1987, the judge issued his initial decision.[5]

In Opinion No. 275, we addressed only those issues that concerned the IPAMS complaint. The facts of the case, which are clearly set out in the judge's initial decision, can be summarized as follows.[6] Panhandle did not accept the non-discriminatory access provisions of Order No. 436 [*FERC Statutes and Regulations, Regulation, Preambles 1982-1985* ¶ 30,665] by October 31, 1985. Ac-

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(1986) (approving offer of settlement filed by IPAMS and CIG and terminating Docket No. CP86-663-000).

[4] Panhandle filed twelve applications in the following dockets for certificate authorization to transport nearly one Bcf/day of natural gas on an interruptible basis for various shippers: CP86-232-000 (67,000 Mcfd for Archer Daniels Midland Corporation); CP86-504-000 (180,050 Mcfd for 39 end-users); CP86-551-000 (3000 Mcfd for American Cynamid Company); CP86-573-000 (529,058 Mcfd for 92 end-users); CP86-598-000 (3000 Mcfd for Kansas Industrial Energy Supply Company); CP86-645-000 (45,000 Mcfd for Amoco Production Company); CP86-655-000 (10,000 Mcfd for Tennessee Gas Pipeline Company, a Division of Tenneco Inc.); CP86-660-000 (85,000 Mcfd for Columbia Gas of Ohio, Inc.); CP86-669-000 (20,100 Mcfd for eight end-users); CP86-670-000 (6000 Mcfd for Cabot Corporation); CP86-671-000 (5200 Mcfd for Carnation Company). *See Panhandle Eastern Pipe Line Co. et al.*, Docket No. CP86-232-000, *et al.*, 36 FERC ¶ 61,282 (1986) (consolidating complaint as six applications and setting proceeding for expedited hearing); *Panhandle Eastern Pipe Line Co.*, Docket No. CP86-232-000 *et al.*, 36 FERC ¶ 61,334 (1986) (consolidating six additional Panhandle applications with the proceeding).

[5] 38 FERC ¶ 63,009 (1987).

[6] *See* 38 FERC at pp. 65,053-68 (judge's discussion of issues regarding interim § 311 transportation); *see also* 39 FERC at pp. 61,896-99 (summary of facts in Opinion No. 275).

cordingly, the pipeline's grandfathered authorization to transport gas for low priority end-users, under section 157.209(b) of our regulations, was terminated. The pipeline's system remained closed to this type of transportation until April 21, 1986, at which time Panhandle formally announced that it was initiating iterim transportation under section 311 of the NGPA. However, at least by March 27, 1986, Panhandle provided advance notice of this new service to a select group of on-system customers. Later, during the winter hearing season of 1986-87, Panhandle curtailed interruptible transportation on a last-on/first-off basis.

In addition to the select group of on-system customers, one other party knew of the pipeline's plans to initiate interim transportation—PTC. At a minimum, PTC learned of the pipeline's plans from pre-notified customers. Furthermore, Panhandle and PTC maintained a symbiotic relationship, primarily because of shared personnel facilities, and services.

In light of these facts, we concluded that Panhandle had engaged in unduly discriminatory conduct because "those on-system customers of Panhandle who were given advance notice of the initiation of interim transportation obtained a high position on the queue, and this position ensured that their gas would continue to be transported even after the December 1 curtailment took effect." [7] We also concluded that Panhandle gave PTC an undue preference over other marketers because not only was the pipeline responsible for its marketing affiliate's having advance knowledge, but also because "the totality of circumstances surrounding the relationship between Panhandle and PTC leads to the inevitable conclusion that

[7] *Panhandle Eastern Pipe Line Co., et al.*, Docket No. CP86-232-000, *et al.*, 39 FERC ¶ 61,274, at p. 61,900 (1987). In Opinion No. 275, we noted that "[e]ffective December 1, 1986, Panhandle ceased providing interim transportation under NGPA section 311 to those shippers who did not have gas flowing on May 2, 1986 (Tr. 2334-2335)." *Id.*

PTC received its advance knowledge as a direct result of its relationship with Panhandle." [8]

Based on these conclusions, we conditioned Panhandle's continued authorization to provide section 311 transportation upon the pipeline's no longer sharing corporate officers or employees with its marketing affiliate. Moreover, we also devised two additional remedies that required Panhandle to do the following: (1) maintain and file with us a detailed log of transportation requests and their disposition; and (2) in honoring requests for transportation, reposition all shippers who requested interruptible section 311 transportation within a month of the official announcement of the program so that all will be in the same position on the queue.[9]

In Opinion No. 275-A, we addressed those issues pertaining to Panhandle's applications for section 7(c) authorization. Essentially, we did the following: (1) granted Panhandle certificate authorization to transport gas on an interruptible basis on behalf of National Steel Corporation even though it would result in a by-pass of Michigan Consolidated Gas Company (MichCon), a local distribution company (LDC) that is a partial requirements customer of Panhandle; (2) found that Panhandle's twelve section 7(c) applications did not demonstrate a pattern of undue discrimination and granted certificate authority until the earlier of one year from the date of issuance of the order, the date specified in the contract, or the date on which Panhandle accepts a blanket transportation certificate under Part 284 of our regulations; and (3) determined that the sole supplier clause of section 1.9 of Panhandle's tariff impermissibly excluded the

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[8] *Id.* at p. 62,902.

[9] *Id.* at pp. 61,902-07; *see also Panhandle Eastern Pipe Line Co.*, Docket No. CP87-501-000, 40 FERC ¶ 61,187 (1987) (assessing Panhandle a civil penalty of $130,000 for unduly discriminatory conduct in violation of the NGPA).

transportation of gas for system supply for its full requirements (G Rate Schedule) customers.[10]

Three parties filed requests for rehearing of Opinion No. 275,[11] and seven parties filed requests for rehearing of Opinion No. 275-A.[12] Additionally, on September 4, 1987, Panhandle filed a request for clarification of a remedy imposed in Opinion No. 275. Moreover, on September 15, 1987, MichCon filed a motion for a partial stay of Opinion No. 275-A, to the extent that it confers authorization on Panhandle for the construction and operation of certain facilities and the commencement of natural gas transportation on behalf of National Steel. For the most part, the rehearing requests raise no issues that were not sufficiently discussed by the judge in his initial decision or by us in Opinion Nos. 275 and 275-A. However, certain issues were raised which merit some additional discussion. For the reasons discussed below, we will grant the requests for rehearing in part and deny them in part, will clarify Opinion No. 275-A, and will deny MichCon's request for a partial stay.

II. The IPAMS Complaint

Essentially, the parties' requests for rehearing of Opinion No. 275 concern the remedies specified for the undue

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[10] *Panhandle Eastern Pipe Line Co., et al.*, Docket No. CP86-232-000 *et al.*, 40 FERC ¶ 61,220, at pp. 61,754-55 (1987).

[11] Three parties filed for rehearing of Opinion No. 275; (1) Citizens Gas & Coke Utility (Citizens) in Docket No. CP86-232-008; (2) EnTrade Corporation (EnTrade) in Docket No. CP86-232-009; and (3) Panhandle in Docket No. CP86-232-010.

[12] Seven parties filed for rehearing of Opinion No. 275-A; (1) Citizens in Docket No. CP86-232-013; (2) Michigan Public Service Commission (MPSC) in Docket No. CP86-232-015; (3) National Steel Corporation (National Steel) in Docket No. CP86-232-016; (4) Michigan Consolidated Gas Company (MichCon) in Docket No. CP86-232-017; (5) Panhandle in Docket No. CP86-232-018; (6) Carnation Company in Docket No. CP86-232-019; and (7) Central Illinois Light Company (CILCO) in Docket No. CP86-232-020.

discrimination that the order found had been perpetrated by Panhandle. The remedies required Panhandle to cease sharing employees with PTC, to include provisions in its tariff to reflect its procedures for handling requests for transportation services and for the resolution of complaints, to maintain and file a detailed transportation log, and to reposition certain shippers on its queue of transportation requests. Additionally, Panhandle raises certain issues which, when taken together, it says insinuate that the pipeline was "singled out" for unfair treatment. With respect to the prohibition against shared employees, EnTrade would like to see us require a more detailed and comprehensive remedy,[13] while Panhandle contends that the remedy is unnecessary and beyond our power to order.[14] These concerns were raised in the parties' briefs on exception,[15] and were sufficiently discussed in Opinion No. 275.[16] The remaining issues raised on rehearing, however, do merit further discussion.

A. Reporting Requirements

In Opinion No. 275, we noted:

> In light of Panhandle's corporate and operational relationship with PTC, however, we believe that additional prospective measures must be taken to ensure that Panhandle does not "grant any undue preference or advantage" to its marketing affiliate, nor maintain any unreasonable differences in rates, charges, service [or] facilities" between its marketing affiliate and other marketers or shippers. To this end, we will require Panhandle to file . . . [a trans-

[13] EnTrade's rehearing request at 2-6.

[14] Panhandle's request for rehearing of Opinion No. 275 at 20.

[15] *See* Panhandle's brief on exceptions at 8-14. EnTrade's brief on exceptions at 5-8; and IPAMS brief on exceptions at 10-16.

[16] *See* 39 FERC at pp. 61,903.

> portation log and certain other information] as a condition to providing future section 311 transportation service . . . .[17]

In its rehearing request, Panhandle has gone to great lengths in seeking to link this proceeding, and the remedies imposed, with our *Notice of Proposed Rulemaking Related to Marketing Affiliates of Interstate Pipelines* (NOPR) in Docket No. RM87-5-000.[18] Essentially, Panhandle is attempting to litigate the NOPR in the instant dockets. However, Opinion No. 275 involves only the complaint filed against Panhandle. Consequently, this is not an appropriate proceeding for us to entertain those arguments on the proposals in the NOPR; such arguments will be considered as appropriate in Docket No. RM87-5-000, in the context of the arguments raised by the comments filed in that docket.

In an argument appropriate for consideration on rehearing here, Panhandle contends: "The Commission has also exceeded its authority by imposing on Panhandle the unnecessary and unexplained and unduly burdensome data disclosure, reporting requirements and electronic bulletin board directives. It is also anticompetitive and inappropriate to require that confidential and proprietary data, customer lists, profit margins and other sensitive material be either collected by Panhandle or disclosed, especially to competitors."[19] Panhandle's argument is without merit.

After discussing the relevant evidence contained in the record of this proceeding, we found that Panhandle had engaged in unduly discriminatory conduct and had afforded its marketing affiliate an undue preference over other marketers. Accordingly, after outlining our au-

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[17] *Id.* at pp. 61,903-04.

[18] *See* 52 Fed. Reg. 21,578 (June 8, 1987).

[19] Panhandle's request for rehearing of Opinion No. 275 at 20-21.

thority to fashion remedies,[20] we required Panhandle to file, *inter alia*, a transportation log so that we could monitor the pipeline's conduct and thereby ensure against future instances of undue discrimination.

We also disagree with Panhandle's claim that we are requiring the pipeline to divulge confidential information to its competitors. On June 26, 1987, Panhandle filed a motion that requested an extension of time to comply with the reporting requirements and confidential treatment of the following information required by the transportation log: 6(xv)—brokering margins; 6(xvi)—discount data; 6(xvii)—status of requests; and 6(xviii)—position on request queue.[21] On July 2, 1987, pursuant to section 375.302(b) of our regulations, the Secretary granted Panhandle's request for an extension of time, but noted that a request for confidential treatment must be made in accordance with section 388.110 of our regulations.[22] Subsequently, Panhandle filed the information pursuant to section 388.110. Since no person has requested access to information, it has been treated in accordance with those procedures. Furthermore, if such a request is made, Panhandle will have an opportunity to present its argument before we make a decision. Accordingly, Panhandle's request for rehearing on this point is denied because the issue is not yet ripe.[23]

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[20] 39 FERC at pp. 61,902-03.

[21] *See* Panhandle's request for extension of time and confidential treatment at 12-13.

[22] *See* 18 C.F.R. § 388.110 (1987) (procedures for conditional treatment of documents); *Id.* § 375.302(b) (Secretary's authorization to extend time limits).

[23] We note that Panhandle's section 7(c) transportation request log is not confidential. *See* 38 FERC at pp. 65.076-78 (judge's initial decision imposing *Southern Natural* log and policy statement as a condition to granting the 12 section 7(c) applications). In Opinion No. 275-A, we affirmed the judge's condition.

In its request for rehearing, EnTrade also raises concerns about the anticompetitive nature of certain information to be maintained in the transportation log: (1) the source of the gas transported (6(viii)); (2) the identity of the ultimate end-user (6(xii)); and (3) the prices which PTC paid for the gas sold (6(xv)). As to the first two issues, EnTrade states:

> [A]lthough the NOPR provides that this information does not have to be provided until 30 days after initiation of service and even then can be provided directly to the Commission . . . , this provision has not been directly incorporated into Order 275, and as it stands, Panhandle can insist upon the name of the end-user from the date transportation is first requested, and will then make it public to all comers.[24]

We take this opportunity to stress, once again, that the conclusions reached in Opinion No. 275 and the reporting requirements ordered therein are based on the record compiled in the instant proceeding, and are independent of the NOPR issued in Docket No. RM87-5-000. Our requirements that Panhandle maintain, file, and provide access to a transportation log are based on the evidence of unduly discriminatory conduct by Panhandle (and Panhandle's anti-competitive and undue preference for its marketing affiliate) in the record of the instant proceeding, and are designed to monitor Panhandle's conduct so as to ensure against future acts of undue discrimination and to assure that necessary information is made available to potential shippers on its system.[25]

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[24] EnTrade's rehearing request at 7.

[25] The transportation log in question is essentially the same as the one required of Southern Natural Gas Co. in Docket No. CP86-277-001 *et al.*, 36 FERC ¶ 61,275, at pp. 61,681-82 (1986). However, it has been modified in light of our finding that Panhandle gave its marketing affiliate an undue preference over other marketers.

The provisions of the NOPR do not apply to Panhandle's reporting requirements.

In Docket No. CP86-232-011 [26] we concluded that, for the purposes of determining a valid transportation request, the source of the gas, and the downstream transporters, need be described only by identifying the immediate upstream and downstream transporters at the time that the transportation contract is executed rather than when the request for service is made.[27] We believe that this conclusion is equally applicable to the transportation log specification at issue. Accordingly, we now clarify that Panhandle can comply with item 6(viii) by listing the immediate upstream transporter and, if there is no upstream transporter, by merely listing the state of the source of the gas. Similarly, Panhandle can comply with item 6(xii) by merely listing the immediate downstream transporter, and if there is no downstream transporter, by merely listing the state in which the end-user is located. In light of this clarification, and the fact that Panhandle cannot require this information until a transportation contract is signed, we do not believe that Panhandle's compliance with these portions of the log will have any anticompetitive effects.

EnTrade also requests rehearing on question 6(xv): "Whether and by how much the cost of gas to the affiliated marketer exceeds the price received for the sale of gas by the marketer, i.e., whether the gas is being sold at a loss, after deducting associated costs including those incurred for transportation . . . ." EnTrade does not dispute Panhandle's claim that the information supplied in this item merits confidential treatment. Rather, EnTrade proposes that Panhandle should be required to file the information in a modified form so that other shippers

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[26] 40 FERC ¶ 61,168 (1987).

[27] *Panhandle Eastern Pipeline Co. et al.*, 40 FERC ¶ 61,168, at p. 61,532 (1987).

may be alerted to possible disparities, yet all the while protecting the confidential nature of the information.[28] In our opinion, implementing EnTrade's proposal would impose on Panhandle additional burdens of negligible informational value. Accordingly, we decline to accept the suggestion.

On September 4, 1987, Panhandle filed a motion that requested clarification of the following: "[I]n meeting the requirement that it provide the public with 24-hour access, by electronic means, to the informational log of transportation requests and dispositions, Panhandle may do so by utilizing an established commercial data distribution firm which provides access at its normal rate payable by the requestor." [29] Panhandle states that it has complied with the Electronic Bulletin Board (EBB) condition by contracting with EnerNet Corporation, a firm regularly engaged in providing customers with electronic data concerning spot natural gas, pipeline transportation and related matters. Moreover, Panhandle maintains that, although it has absorbed the cost of developing EnerNet's EBB and is paying monthly charges for maintaining the EBB, EnerNet itself will provide Item No. 6 data only to parties who pay an initiation fee of $100, in addition to a monthly charge of $100, which can be applied against computer time charges of $15 per quarter hour.

We find that the current billing mechanism established by EnerNet (as described in the filing) is not inconsistent with the EBB condition established in our order. No valid purpose would be served by requiring Panhandle to absorb all costs related to the operation of the EBB. On the other hand, we will not allow Panhandle to pass on to its ratepayers the costs which Panhandle

[28] EnTrade's rehearing request at 9-10.

[29] Panhandle's request for clarification at 1.

incurred in developing the EBB. Since the Opinion required Panhandle to maintain the EBB because of its unduly discriminatory conduct, the pipeline's customers should not be forced to pay for Panhandle's establishing and maintaining the system.

Similarly, we note that Panhandle has raised certain questions regarding the type of information desired or the organizational format of the data to be filed in compliance with Opinion No. 275. Panhandle may consult with our technical staff to establish practical guidelines for compliance with the Opinion in the most efficient, economical, and least burdensome manner. A statement reflecting any agreed upon refinements should be filed by Panhandle with us and served on the parties to the proceeding.

Accordingly, we affirm the reporting requirement remedy, and underlying findings and conclusions, as discussed above. The requests for rehearing of Panhandle and EnTrade on these issues are denied.

B. Repositioning

In Opinion No. 275 we found that certain shippers, who did not receive advance notice, were relegated to a lower position on the interruptible transportation queue and, as a result, had their transportation curtailed.[30] To remedy these injuries, we required "Panhandle, in honoring requests for transportation, to reposition all shippers who requested transportation by May 21, 1986, so that all will be in the same position on the queue." [31] In their

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[30] *Id.* at p. 61,906.

[31] *Id.* Our finding that certain shippers were harmed is buttressed by the fact that only eleven days transpired between the date Panhandle publicly announced its initiation of interim transportation (April 21, 1986) and the date the pipeline used as the basis for its winter curtailment (May 2, 1986).

rehearing requests, Panhandle and Citizens argue that there is no evidence in the record showing that such injuries occurred. We disagree.

To begin with, injury is *not* an element in a *prima facie* case of undue discrimination. In *Sebring Utility v. FERC*,[32] the United States Court of Appeals for the District of Columbia stated that "it is not necessary to show overall costs of doing business or a competitive disadvantage in order to prove undue discrimination or preference in favor of others." [33] Nevertheless, the record clearly establishes that, because of system capacity limitations during the winter heating season of 1986-87, Panhandle needed to curtail 200,000,000 cubic feet of natural gas per day. Using a last-on/first-off curtailment methodology, Panhandle stated that it would curtail all interruptible transportation for those shippers who did not "have gas flowing" by May 2, 1986. (Tr. 2334-35, 2342, 2385). Additionally, we now take official notice of the reports Panhandle filed under section 284.106 of our regulations, from March 1986 to March 1987. The information contained in these reports highlights the fact that certain shippers, who requested transportation within a month of Panhandle's formal announcement, did not "have gas flowing" by this date.[34] Unlike the prenotified shippers who had more than five weeks to arrange for transportation, these shippers had little more than a week. The result was that these shippers had their transportation curtailed.

Panhandle also contends that our remedy of repositioning the section 311 shippers on the queue is inconsistent

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[32] 591 F.2d 1003 (1979).

[33] *Sebring Utility v. FERC*, 591 F.2d 1003, 1009, n.24 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 879 (1979).

[34] *See, e.g.*, Panhandle's reports filed in Docket Nos. ST86-1668; ST86-2090; ST86-2054; ST86-1884; ST86-2502; ST86-1734; ST-86-1735; ST86-1755.

with our first-come/first-served principle. This contention is erroneous. As we have stated in *Pacific Gas Transmission Company*, Docket No. CP87-159-000 *et al.*,[35] "the use of an open season for receiving initial service requests promotes the Order No. 436 goal of equality of access for all shippers."[36] In any event, we required the repositioning to preserve the integrity of our first-come/first-served policy in light of Panhandle's unduly discriminatory conduct.

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[35] 40 FERC ¶ 61,193 (1987).

[36] *Pacific Gas Transmission Co.*, Docket No. CP87-159-000 *et al.*, 40 FERC ¶ 61,193, at p. 61,618 (1987). In *PGT* we explained that an "open season" is consistent with Order No. 436:

> [T]he open-season treatment of transportation bids (i.e., treating all requests received during the open season as if they were simultaneously filed on the same day) will eliminate the possibility that shippers (affiliated and nonaffiliated) with close ties to PGT could use advance knowledge of PGT's plans to implement Order No. 436 transportation to gain a high position on the queue.

Id. Ironically, after arguing that the repositioning remedy is inconsistent with our first-come/first-served policy (Panhandle's request for rehearing of Opinion No. 275 at 14-15). Panhandle then makes the following argument:

> The Commission has also committed legal error in basing its finding of undue discrimination here upon a presumed standard of equality among all classes of shippers for priority entitlement in the queue. Yet the Commission's orders demonstrate that first-come, first-served is not a requirement of law. Certainly, it is not a government standard.

(Panhandle's request for rehearing of Opinion No. 275 at 17.) To begin with, we take this opportunity to stress that the first-come/first-served policy is a governing standard for determining priority among those who seek transportation under Part 284 of our regulations. *See Associated Gas Distributors v. FERC*, 824 F.2d 981, 1005-07 (1987) (determining that the Commission may develop the policy on a case by case basis rather than in the context of a rulemaking). Moreover, this is not the proper proceeding for litigating the legal basis for our first-come/first-served policy. Accordingly, inasmuch as Panhandle cites no cases to support its argument, this portion of its rehearing request is also denied.

In Opinion No. 275-A, we stated our belief that granting the twelve section 7(c) applications would not adversely affect the repositioned section 311 shippers.[37] Our belief was premised upon section 6.10 of Panhandle's PT rate schedule, which essentially provides that an interruptible shipper's place on the queue is based upon the date that the shipper submits a valid request for transportation. There are two notable exceptions to this general rule: (1) if the request is to extend existing service, then the date the service was authorized under section 7(c) or performed under section 311 is used to determine priority; and (2) if transportation does not commence within 90 days of receipt of the valid request, the shipper loses its position on the queue and is assigned a new date to determine priority. After noting that two of the section 7(c) applications requested authorization for existing service—Docket Nos. CP86-504-000 and CP86-573-000—we determined that, if Panhandle followed its tariff, the remaining section 7(c) shippers would be relegated to a lower position on the queue than the repositioned section 311 shippers (who all requested service between April 21 and May 21, 1986).

Panhandle also requests rehearing of this portion of Opinion No. 275-A "to the extent that it establishes an irrevocable methodology establishing a queue." [38] Specifically, Panhandle argues:

> [T]he specific procedures concerning length of time a request remains valid mentioned in Opinion No. 275-A apply only to transportation authorized on a self-implementing basis. With respect to transportation that can be performed only upon specific authorization, requiring a shipper to renew his request every ninety days while the requested authorization is pending approval of the Commission makes no

[37] 40 FERC at p. 61,757.

[38] Panhandle's request for rehearing of Opinion No. 275-A at 15.

sense. Accordingly that procedure has not been interpreted as applicable to the requests.[39]

At the onset, we stress that our analysis concerning the interruptible transportation queue was based solely on the controlling provisions of Panhandle's PT rate schedule.[40] Those provisions of Panhandle's tariff do not provide that the 90-day limit applies only to self-implementing transportation.[41] Moreover, we see no real difference between requiring either a self-implementing or a certificate authorized shipper to make another request for transportation in order to preserve his priority for service. Inasmuch as were merely directed Panhandle to comply with the tariff that it filed, Opinion No. 275-A does not preclude Panhandle from filing revised tariff sheets that amend the method by which the pipeline establishes its interruptible transportation queue. However, until such filings are made and approved, Panhandle must follow the terms of its PT rate schedule.

Two other parties have requested rehearing of this portion of the Opinion. First, National Steel contends that its "position on the queue should be defined either by the date of its initial request for service or of its contract with Panhandle Eastern or by the date of the

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[39] Panhandle's request for rehearing of Opinion No. 275-A at 15 n. 7.

[40] *See* 40 FERC at p. 61,757 and n. 55.

[41] Section 6.10(b)(2) of Panhandle's PT rate schedule provides:

> The date of request for any other service (new service) shall be the date of Transporter's receipt of a valid Request for Transportation for the service under Section 6.9(d) herein. The assigned date of request for new service will expire after ninety (90) days unless service is commenced within the ninety (90) days. Upon such expiration Shipper may make further Request for Transportation to be assigned the appropriate later date of request.

certificate application." [42] We will deny National Steel's request. The initial decision granted Panhandle certificate authorization to transport under the PT rate schedule for, among others, National Steel.[43] As noted above, our discussion of the interruptible transportation queue was based upon Panhandle's PT rate schedule. We find that National Steel has not presented sufficient evidence to justify an exception to the provisions of the tariff under which it is to receive transportation.

Second, Carnation Company requests rehearing "to correct Opinion No. 275-A to show that Carnation's service in Docket No. CP86-671, like the service covered by Docket Nos. CP86-504 and CP86-573, should retain its original position in the interruptible queue." [44] Carnation, an end-user, contends that it was an existing shipper at the time Panhandle filed the certificate application in Docket No. CP86-671-000. Specifically, Carnation contends that Panhandle was transporting Carnation's gas pursuant to Subpart F of Part 157 of our regulations under three different dockets: (1) ST86-1754 for Illinois Power Company; (2) ST86-1808 for Missouri Public Service Company; and (3) ST86-1842 for the City of

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[42] National Steel's rehearing request at 7. National Steel maintains that it first requested transportation on September 29 1983, that it signed a transportation agreement on September 23, 1985, and that Panhandle filed the application in Docket No. CP86-232-000 on December 12, 1985. *Id.* at 6.

Citizens also contends that the repositioning remedy should be deleted because it provides "specific shippers with a preference they are not necessarily entitled to . . . ." Citizens' rehearing request at 4. Citizens' contention is without merit. We have already noted that certain shippers were harmed by virtue of not receiving advance notice. Moreover, it is well established that in order to remedy discriminatory treatment, the government may help injured parties to achieve the status denied them. *See, e.g., United States v. Paradise,* 107 S. Ct. 1053, 1073 (1987).

[43] *See* 38 FERC at pp. 65,071, 65,077.

[44] Carnation's rehearing request at 4.

Morton, Illinois. Carnation further maintains that the interruptible transportation in each of the three ST dockets has continued without a break in regulatory authorization.

Carnation's position on the queue will be determined in accordance with Panhandle's PT rate schedule. We take care to note, once again, that our discussion in Opinion No. 275-A concerning Panhandle's PT rate schedule provisions relating to priority on the queue, was merely our interpretation of the pipeline's tariff as it currently exists; we did not modify that tariff nor did we prevent Panhandle from modifying it in the future. We also note that, although one of the self-implementing transportation requests for Carnation was commenced between April 21 and May 21 (Docket No. ST86-1808-000 on May 19, 1986), the effect on the repositioned section 311 shippers should be minimal because Carnation was in the class of shippers repositioned. However, to ensure this result, we will require that Panhandle not position Carnation, or any other shipper for whom the pipeline received transportation certificate authorization in Opinion No. 275-A, higher on the queue than the repositioned section 311 shippers.

Finally, Citizens requests clarification as to the time period during which shippers who requested transportation would be placed in the same position on the queue.[45] Our remedy is intended to position all shippers who requested transportation between April 21, 1986 (the time that Panhandle formally announced the initiation of interim section 311 transportation) and May 21, 1986 on the same place on the queue. This one month open season

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[45] Citizens' rehearing request at 4. Specifically, Citizens wants to know whether we intend "to lump all shippers requesting transportation between March 27, 1986, and May 21, 1986, together as the queue [or if we intend] to allow all shippers requesting service prior to May 21, 1986, to be placed in the same position for transportation . . . ." *Id.*

is roughly equivalent to the number of days Panhandle provided advance notice to its on-system customers (26 days—from March 27, 1986 to April 21, 1986).

C. *Procedural Claims*

In its rehearing request, Panhandle also contends that it was denied due process of law because of certain alleged *ex parte* communications and other procedural postures taken by our staff and the presiding administrative law judge throughout this proceeding. In *Goldberg v. Kelly*,[46] the United States Supreme Court determined that to satisfy the requirements of procedural due process an administrative agency must offer a party the following: (1) timely and adequate notice, (2) opportunity to confront adverse witnesses and present oral evidence, (3) the right to appear with counsel, (4) a determination based solely on the record and one that states reasons for the decision and evidence relied on, and (5) an impartial decision maker.[47] After reviewing Panhandle's claims, we find that they do not establish that the pipeline was denied any of the above components of due process.

1. *Ex Parte Communications*

In its request for rehearing, Panhandle argues that certain *ex parte* communications among the complainant and Commissioners and their personal staffs resulted in its being treated unfairly.[48] These contentions are groundless and totally without merit.

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[46] 397 U.S. 251 (1970).

[47] *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970)

[48] In its request for rehearing of Opinion No. 275 at 21-22, Panhandle alleges:

> [T]his proceeding was not conducted in compliance with the Commission's Regulations. Prior to the filing of the Complaint, the Complainant David Wilson had contacts with Commissioners and their personal staffs which included discussions of his

In essence, Rule 2201 of our Rules of Practice and Procedure provides that neither Commissioners nor Commission employees shall request or entertain off-the record communication with a party to a pending contested proceeding.[49] Rule 2201 specifically defines *ex parte* communications as "an oral or written communication relative to the *merits* of an on-the-record proceeding pending before the Commission which is not on the public record and with respect to which reasonable prior notice the parties is not given, *but it shall not include requests for status reports on any matter . . . .*" [50] The only evidence that Panhandle submitted to support its contentions is the deposition of Mr. Wilson, the complainant. That deposition clearly shows that any communications which he had with individual Commissioners, or employees of the Commission, were either requests for status reports or discussions on general gas transportation issues not related to the merits of the instant proceeding.[51] Ac-

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view of the role of the pipelines and marketers. After the Complaint was filed and while it was pending before the Commission, Mr. Wilson, President of IPAMS and IGM, contacted Commissioners and their personal staffs concerning this case. None of such contacts was made a part of the public record as required by the Commission's *Ex Parte* Regulations. Those contacts and the failure to comply with required procedures was unfair to Panhandle and has caused additional defects in the proceeding.

[49] 18 C.F.R. § 2201 (1987).

[50] *Id.* (emphasis added).

[51] Mr. Wilson stated that since 1982, "I have discussed transportation in a generic sense with Mr. Chris Warner in the Office of the General Counsel, with Hollye Cappleman who works for Commissioner Stalon, with Commissioner Stalon, with Susan Court who works for Commissioner Sousa, with Commissioner Naeve, with Commissioner Trabandt." Wilson's deposition at 73.

The deposition, however, clearly shows the following. Commissioner Stalon merely discussed general transportation matters, such as Order No. 451 [*FERC Statutes and Regulations* ¶ 30,701], with Mr. Wilson by telephone and at the IPAMs annual convention in

cordingly, we find that there were no *ex parte* communications.

Panhandle's right to an impartial decisionmaker was not denied in any way. In *Municipal Electric Utilities Association of the State of New York v. Power Authority of the State of New York*,[52] we stated:

> [I]n the absence of evidence to the contrary, regulators are presumed to have the integrity and intellectual discipline to judge a proceeding on its merits. *United States v. Morgan*, 313 U.S. 409, 421 (1941). That presumption is not lightly overcome. It is a long standing rule that judges have an obligation not to disqualify themselves without a valid reason. *Simpson v. General Motors Corporation*, 425 F. Supp. 574 (D.C. Pa. 1976). This consideration applies with equal or greater force to Commissioners, who have a policymaking as well as judicial role and cannot be replaced, as judges can when they withdraw from a proceeding.[53]

August of 1986. *Id.* at 75. Similarly, Commissioner Trabandt merely discussed general transportation issues with Mr. Wilson at a gas producer convention in Oklahoma in 1986 and, earlier, while Commissioner Trabandt was a staff member of the Senate Energy Committee. *Id.* at 75-76. Moreover, Commissioner Naeve merely spoke at an IPAMS seminar in February of 1986, before the complaint was filed. Mr. Wilson also once asked Commissioner Naeve about the scheduling of the proceeding, nothing substantive was discussed. *Id.* at 78-79. Mr. Warner was once asked about the schedule of the proceeding. Ms. Court once participated in a seminar panel in Calgary, Canada with Mr. Wilson before the complaint was filed, and subsequent to that time was merely asked a question concerning the proceedings' schedule. *Id.* at 77, 80. Finally, Ms. Cappleman merely discussed transportation issues in a generic sense. *Id.* at 73.

[52] Docket No. EL78-24-021 *et al.*, 23 FERC ¶ 61,064 (1983).

[53] *Municipal Electric Utilities Association of the State of New York v. Power Authority of the State of New York et al.*, Docket No. EL-78-24-021 (Phase 1), 23 FERC ¶ 61,064, at p. 61,144 (1983), *generally aff'd*, *Power Authority of the State of New York v. FERC*, 743 F.2d 93 (2d Cir. 1984).

Panhandle has presented no evidence to rebut the presumption of the individual Commissioners' (or staff members') integrity. We find that Panhandle was not denied its rights to an impartial decisionmaker in the instant proceeding.

2. *Other Claims*

In its rehearing request, Panhandle also contends:

> [T]he Commission in its initial order as well as its succeeding orders, made certain that Panhandle would not be able effectively to defend itself, by (a) conducting an investigation utilizing its Enforcement Staff without complying with the Regulations applicable to such investigations, and without defining the scope of the investigation; (b) by failing to prescribe that the issues to be determined in the complaint proceeding should be those specified in the Complaint, but instead by enlarging those issues to an undesignated and unlimited, overly broad extent; (c) by taking the unprecedented action of repeatedly calling upon parties other than the Complainant to bring into the proceeding any and all charges of discrimination that they might care to assert, thereby precluding Panhandle from being able to ascertain from the outset the nature of the charges being investigated and tried; (d) by adding additional issues and consolidating additional matters so as to make the proceeding unwieldy and cumbersome; and (e) by precluding Panhandle from conducting adequate discovery because of the time limitations dictated from the outset, and precluding Panhandle from full development of its defense because of the necessity for meeting the artificial deadlines.[54]

Panhandle has submitted no evidence to support these contentions, nor has it explained how it was harmed, nor

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[54] Panhandle's request for rehearing of Opinion No. 275 at 22-23.

what steps it could have taken, if given the opportunity, to prevent the alleged harm. Rather, the pipeline has merely made a string of conclusory statements. We find that Panhandle's request for rehearing on these points is legally deficient.[55] Accordingly, this portion of its request for rehearing is denied.

III. Section 7(c) Applications

The parties' requests for rehearing of Opinion No. 275-A for the most part raise concerns that were adequately discussed in the initial decision and the Opinion. However, issues in the following areas have been raised which merit our discussion: (1) the term of certificate authorization; (2) the by-pass; (3) the sole supplier clause of Panhandle's tariff.

A. Authorization Term

In Opinion No. 275-A we granted Panhandle certificate authorization to transport gas "until the earlier of (1) one year, (2) the specified date on the contract, or (3) the date on which Panhandle accepts a blanket certificate under Part 284 of our regulations." [56] Citizens, National Steel, and Panhandle request rehearing of the term of authorization. Panhandle filed in Docket No. CP86-504-000 an application requesting certificate authority to continue interruptible transportation service of up to 185,250 Mcf/d for 39 shippers who were previously receiving transportation under various certificates. On June 9, 1986 Panhandle and Citizens (the local distribution company involved in the transaction) extended the term of

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[55] *See, e.g., Tennessee Gas Pipeline Co., a Division of Tenneco Inc.*, Docket No. RP73-113, Opinion No. 769-A, 58 FPC 1999, 2002 (1977) (finding an application for rehearing legally deficient because it was premised merely on conclusory statements).

[56] 40 FERC at p. 61,758.

the underlying transportation agreement until the earlier of April 30, 1987 or 30 days after Panhandle accepts a blanket certificate. Therefore, when Opinion No. 275-A was issued, the underlying transportation agreement had already expired. Nevertheless, on September 14, 1987, Panhandle filed its acceptance of the certificate in question. We construe Panhandle's acceptance as an indication of the pipeline's desire to provide transportation service for Citizens despite the fact that the underlying agreement has expired. Therefore, we will amend Ordering Paragraph (B) of Opinion No. 275-A so that Panhandle is authorized to provide the transportation described in Docket No. CP86-504-000 until the earlier of one year from the date of issuance of Opinion No. 275-A or the date on which Panhandle accepts a blanket transportation certificate.

National Steel requests that we extend the term of authorization in Docket No. CP86-232-000 to the full contract term (5 years) or, at least, one year from the date gas begins to flow.[57] National Steel contends that its request is justified because of the following: (1) a United States District Court Judge in Michigan has issued a preliminary injunction enjoining Panhandle from delivering gas to National Steel;[58] (2) the Michigan Public Service Commission has issued an order prohibiting Panhandle from initiating service; (3) MichCon, allegedly, may terminate all interconnection and service with National Steel, if the Panhandle interconnect is operated.[59] We agree with National Steel that the orders prohibiting bypass transportation and the alleged possibility of termination of back up services could affect the value of the

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[57] National Steel's rehearing request at 2.

[58] *See Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, No. 87-7339IDT (D. Mich. filed Sept. 14, 1987) (preliminary injunction granted orally on October 1, 1987).

[59] National Steel's rehearing request at 2-3.

certificate authorization, but we are unwilling to extend the term of the authorization based on such speculation. As indicated below, we have consistently limited similar certificates to a one year term. Panhandle is free to seek an extension of its certificate to serve National Steel at the appropriate time. Accordingly, we deny National Steel's request for rehearing on this point, but note that our determination is without prejudice to any future application by Panhandle to amend the term of the certificate authorization.[60]

Panhandle also requests rehearing of the certificate condition in Opinion No. 275-A providing that "in no case shall the term be longer than one year from the date this order is issued." [61] Panhandle contends that "[t]his is a patently unlawful condition." [62] To support this contention, Panhandle states:

> In nine of the [12] applications Panhandle requested authorization to transport to the earlier of the term of the individual contract between Panhandle and the shipper or 30 days after Panhandle accepted a blanket transportation certificate . . . .
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> * * * *
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> However, the presiding Administrative Law Judge conditioned [all] the certificates by limiting their terms to the earlier of the terms of the contracts or

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[60] Because of the uncertainty related to National Steel's transportation program, the company also requests rehearing of that portion of Opinion No. 275-A that denies flexible receipt point authorization for Docket No. CP86-232-000. These concerns do not justify us deviating from our stated policy on this issue. *See infra* notes 65-66 and accompanying text. Accordingly, National Steel's request for rehearing on this point is denied.

[61] Panhandle's request for rehearing of Opinion No. 275-A at 2-7; *see* 40 FERC at p. 61,757.

[62] Panhandle's request for rehearing of Opinion No. 275-A at 3.

> 30 days after Panhandle accepted a blanket transportation certificate.[63]

The judge explained that the condition would put "all the interruptible transportation involved herein on an equal footing and will eliminate any undue capacity priority advantages when Panhandle becomes an open access transporter under Order No. 436." [64] We note that Panhandle does not raise now any objection to the judge's condition. Moreover, in light of the fact that Panhandle has not yet accepted a blanket transportation certificate,[65] nine of the twelve underlying transportation certificates will terminate, by their own terms, by September 9, 1988. Obviously, the one-year limitation does not affect the authorization for the transportation described in those nine dockets.

Furthermore, in *Florida Gas Transmission Company*, Docket No. CP87-57-002 *et al.*,[66] we explained the one-year limitation as follows:

> Following our decisions in *Texas Gas Transmission Corporation*, 36 FERC ¶ 61,274 (1986), and *Colorado Interstate Gas Company*, 40 FERC ¶ 61,231 (1987), our policy has been to authorize transportation services under individual section 7(c) transportation certificates for one year. This policy is based on our concern about the potential for undue

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[63] *Id.* at 2-3. In Docket Nos. CP86-232-000, CP86-645-000, and CP86-660-000, Panhandle requested certificate authorization to transport gas for the terms of the underlying contracts, all of which extended beyond September 9, 1988.

[64] 38 FERC at p. 65,077.

[65] *See Panhandle Eastern Pipe Line Co.*, 39 FERC ¶ 61,101 (1987) (denying application for a blanket transportation certificate); *see also Panhandle Eastern Pipe Line Co.*, Docket No. RP86-116-007 *et al.*, 41 FERC ¶ 61,202 (1987) (issuing blanket transportation certificate, denying rehearing and clarifying prior order).

[66] 41 FERC ¶ 61,267 (1987).

> discrimination in proposals to certificate individual transportation arrangements under section 7(g) of the Natural Gas Act (NGA). It is also based on the fact that the industry is currently in a transition period pending ultimate implementation of the blanket transportation policies adopted in Order Nos. 436 and 500.[67]

Because Panhandle has made no arguments that would justify deviating from our stated policy, we deny this portion of its rehearing request.[68]

B. By-Pass

In addition to MichCon, the State of Michigan and the Michigan Public Service Commission (Michigan) have filed requests for rehearing of our disposition of Docket No. CP86-232-000, authorizing Panhandle to transport natural gas for National Steel thereby by-passing MichCon, the LDC. Michigan requests that we dismiss the application in Docket No. CP86-232-000 for lack of

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[67] *Florida Gas Transmission Co., Docket* No. CP87-57-002 *et al.*, 41 FERC ¶ 61,267 (1987) (footnote omitted).

[68] Panhandle maintains that the one-year limitation is not warranted in this instance because the judge found that "Panhandle's twelve section 7(c) applications at issue herein do not demonstrate a pattern of undue discrimination by favoring a particular group of shippers, by treating similarly situated shippers differently, by favoring fuel-switchable end-users or by denying shippers access to transportation an unduly discriminatory manner. *See* Panhandle's request for rehearing of Opinion No. 275-A at 6 (citing 38 FERC at p. 61,077). In spite of this finding, the judge imposed the *Southern Natural* log and policy statements because of a remaining concern with the possible existence of discriminatory transportation on the Panhandle system. This concern is amplified by the fact that this proceeding authorizes the transportation of nearly one Bcf of gas per day. Absent any concerns with discriminatory transportation, we find that the one-year limitation is appropriate because, as noted above, the industry is currently in a transition period pending ultimate implementation of our transportation policies adopted in Order Nos. 436 and 500.

jurisdiction. Michigan argues that, although the natural gas will be transportated in interstate commerce, nevertheless, it is not subject to our jurisdiction because the transportation is for an end-user and therefore is "essentially local." We disagree.

Docket No. CP86-232-000 involves natural gas that is purchased by National Steel in Oklahoma and transported by Panhandle to Michigan. The gas, therefore, will be moving in interstate commerce as defined by the NGA.[69] Because our jurisdiction extends over the transportation of gas to be delivered to end-users,[70] Panhandle's transportation service is subject to our jurisdiction.[71] Furthermore, once we find the proposed transportation to be in interstate commerce, section 7(c) of the NGA requires the pipeline to obtain from us a certificate of public convenience and necessity authorizing such transportation.[72]

After holding an extensive hearing on the issue, the judge found that the transportation service described in Docket No. CP86-232-000 was required by the public convenience and necessity.[73] Accordingly, he granted Panhandle certificate authorization to perform the trans-

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[69] 15 U.S.C. § 717a(7) (1982) ("'Interstate Commerce' means commerce between any point in a State and any point outside thereof, or between points within the same state but through any place outside thereof, but only insofar as such commerce takes place within the United States.").

[70] *See International Paper Co. v. FPC*, 438 F.2d 1349, 1355 (2d Cir. 1971), *cert. denied*, 404 U.S. 827 (1971); *ANR Pipeline Co.*, Docket No. CP84-386-000; 34 FERC ¶ 61,238 (1986); and *Public Service Electric and Gas Co. v. FPC*, 371 F.2d 1 (2d Cir. 1967), *cert. denied*, 389 U.S. 849 (1967).

[71] *See* 15 U.S.C. § 717(b) (1982) ("The provisions of this Act shall apply to the transportation of natural gas in interstate commerce . . . .").

[72] *See id.* § 717f(c)(1)(A).

[73] 38 FERC at p. 65,876.

portation.[74] In Opinion No. 275-A, we affirmed the judge.[75] In *Interstate Power Co.*, Docket No. CP86-316-000,[76] we stated that "once a company is found to be a nautral gas company, no state can interfere with Federal regulations." [77] Furthermore, in *Public Service Commission of West Virginia v. FPC*,[78] the United States Court of Appeals for the Fourth Circuit stated that "nowhere in [section 7], or elsewhere in the [NGA] is found any provision which requires [the Commission] to act jointly with a state utility Commission, or to condition its grant of authority or approval upon the action of a state regulatory body . . . ." [79]

Michigan contends that it has jurisdiction over the by-pass, because the transaction involves the local distribution of nautral gas (and facilities used for such distribution), which section 1(b) of the NGA purportedly excludes from our jurisdiction.[80] By way of background, we note that Panhandle will establish two new delivery points in order to effectuate the transportation that we have authorized. To this end, Michigan argues that "Michigan law requires a publics utility—including a company 'transmitting, delivering or furnishing' gas—to obtain MPSC approval before beginning the construction or operation of any public utility plant or system

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[74] *Id.* at p. 65,078.

[75] 40 FERC at pp. 61,751-52.

[76] 36 FERC ¶ 61,127 (1986).

[77] *Interstate Power Co., Docket* No. CP86-316-000, 36 FERC ¶ 61,127, at p. 61,298 (1986).

[78] 437 F.2d 1234 (4th Cir. 1971).

[79] *Public Service Commission of West Virginia v. FPC*, 437 F.2d 1234, 1238 (4th Cir. 1971).

[80] 15 U.S.C. § 717(b) (1982) (NGA not applicable to the local distribution of natural gas or the facilities used for such distribution).

in any municipality where any other utility is engaged in rendering the same sort of service." [81] It is unclear from Michigan's request for rehearing whether Michigan argues that Panhandle is engaging in the local distribution of gas or whether Michigan believes that National Steel is engaging in the local distribution of gas. We believe that either alternative is untenable.

In *FPC v. East Ohio Gas Co.*,[82] the United States Supreme Court noted that it had long distinguished between interstate commerce and local distribution: "[T]he national commerce power alone covered the high pressure trunk lines to the point where pressure was reduced and the gas entered local mains, while the state alone could regulate the gas after it entered those mains." [83] Pan-

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[81] Michigan's rehearing request at 4 n. 1 (citation omitted). Michigan bases its assertion of jurisdiction upon section 460.502 of the Michigan Compiled Laws, Section 460.502 provides:

> No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public concenience and necessity requires or will require such construction, operation, service or extension.

Mich. Comp. Laws Ann. § 460.502 (West 1967); *see id.* 460.501 ("The term 'public utility', when used in this act, means persons and corporations, other than municipal corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation.").

[82] 338 U.S. 464 (1950).

[83] *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 470 (1950) (footnote omitted).

handle's transmission is performed by a large diameter, high pressure pipeline that transports gas from production areas, through various states, to local distribution companies and end-users.

Michigan, however, apparently believes that once Panhandle transports the gas to the State of Michigan, the gas cannot be delivered to National Steel without the pipeline's engaging in a local distribution function. As discussed above, Panhandle's function does not fit the definition of local distribution as set forth by the Court in *East Ohio.* Moreover, the courts have upheld our traditional exercise of jurisdiction over transactions involving the delivery of gas directly to end-users.[84]

For the reasons discussed above, we find that Panhandle is not engaged in local distribution. Nor do we believe that National Steel will be engaged in local distribution of gas, simply by virtue of its constructing and operating facilities necessary to connect its plant with Panhandle's transmission line. Legislative history in section 1(b) also suggests that Congress did not intend to create a definition of local distribution that would apply to direct transportation from an interstate pipeline to an end-user.[85]

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[84] *See, e.g., International Paper, supra* 438 F.2d at 1355 (concluding that the Commission has jurisdiction over the transportation and facilities of a company that transports gas through its own pipeline from a processing plant to the company's own plant for consumption); *see also ANR Pipeline Co., supra,* 34 FERC at p. 61,412 (determining that tie-in facilities used to serve a local end-user were jurisdictional because they were an essential integral element of the interstate transportation of gas by ANR).

[85] *See* 81 Cong. Rec. 6721 (1937). Rep. Lea explained that the local distribution exemption is based "on the principle that where commerce passes in interstate commerce and reaches the point of broken package, the local state commission has the regulatory power." *Id.* Since the end-user receiving direct transportation from the pipeline never "breaks-up" the package of gas for distribution to the public, that end-user obviously is not engaging in local distribution as envisioned by the drafters of the NGA.

A similar concept of "local distribution" is apparent in section 7 of the NGA. Section 7(a) authorizes us to direct a natural gas company to sell natural gas to any "person . . . engaged or legally authorized to engage in the local distribution of natural gas to the public" and for that purpose to extend its transportation facilities to communities adjacent to the company's facilities or to the territories it serves, when such action is in the public interest and would not impair its ability to serve existing customers.[86] This formulation implies not only that local distribution means service to a local community rather than to an industrial end-user, but also that the local distributor has an existing system supply of gas available for general resale to its various customers.[87]

Michigan also relies on two cases to support its argument. *See Panhandle Eastern Pipe Line Company v. Indiana Public Service Commission*, 332 U.S. 507, 517-21 (1947); *Panhandle Eastern Pipe Line Company v. Michigan Public Service Commission*, 341 U.S. 329, 333 (1951). Its reliance is misplaced. These cases are distinguishable on both factual and legal grounds. Both of the cited cases concerned direct sales by the pipeline to end-users.[88] Based on such facts, the Court in *Public Service Commission of Indiana* correctly stated that "[d]irect sales for consumptive use of whatever were clearly excluded [from the NGA's coverage]."[89] We agree that direct sales by a pipeline to an end-user are beyond our jurisdiction. However, this is not at issue in

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[86] 15 U.S.C. § 717(a) (1982).

[87] *See also* NGPA § 2(17), 15 U.S.C. § 3301(17) (1982) ("'local distribution company' means any person other than an interstate pipeline or intrastate pipeline, engaged in the transportation, or local distribution of natural gas and the sale of natural gas for ultimate consumption.") (emphasis added).

[88] 332 U.S. at 508-09, 341 U.S. 330-31.

[89] 332 U.S. at 517.

this proceeding: "There is not a choice between a direct sale by Panhandle in Michigan or a resale by MichCon in Michigan. Rather the sale of gas is taking place in Oklahoma and is a sale in which Panhandle is not involved." [90] As a result, Panhandle's only role in this transaction is to transport natural gas in interstate commerce. Moreover, even where a transaction involves a direct sale by the pipeline, in *FPC v. Louisiana Power & Light Co.*,[91] the Court clearly stated that "Congress' grant of sales jurisdiction as to sales for resale and the prohibition as to direct sales were meant to apply exclusively to *rate setting*, and in no wise limited the broad base of 'transportation' jurisdiction granted the [Commission] . . . ." [92]

For the reasons discussed above, we find that we have jurisdiction over the transportation described in Docket No. CP86-232-000.[93] In reaching this conclusion, we are simply stating that a State cannot exercise whatever jurisdiction it has over a by-pass transportation service performed by an interstate pipeline when to do so would effectively provide the State with the power to "veto" our orders.[94] In recent years we have developed a regulatory

[90] 38 FERC at p. 65,041.

[91] 406 U.S. 621 (1972).

[92] *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 640 (1972) (emphasis in the origional).

[93] *See* 38 FERC at pp. 65,040-43 (judge's analysis of our jurisdiction over the by-pass). Because we found the judge's reasoning sound, we affirmed the initial decision on this point. *See* 40 FERC at pp. 61,751-52.

[94] *See, e.g., FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19-20 (1961). The Court explained:

> [W]hen a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a "no-man's land" will be created. That

policy designed to encourage pipelines to offer ready access to interstate transportation so as to create competition for wellhead prices.[95] State commissions remain free to regulate the rates and review the purchasing practices of distributors under their jurisdiction. If State commissions had authority to frustrate individual pipeline transactions like this one, however, they could seriously affect our ability to foster the development of an economically efficient system of interstate transportation.

In other words, irrespective of any local effects resulting from the by-pass, we believe that the transportation service at issue here essentially concerns Federal interests, that is, those embodied in developing interstate transportation policy that provides consumers with a variety of supply options by promoting a competitively priced spot market for natural gas. Accordingly, Michigan's request for rehearing is denied.

In its rehearing request, MichCon once again renews its arguments concerning a litany of factual findings and conclusions of law that it disputes. Since both the judge's initial decision and our Opinion No. 275-A adequately discussed these points, MichCon's request for rehearing is denied.

On September 15, 1987, MichCon filed a request for a stay of the certificate issued to Panhandle in Docket No. CP86-232-000. National Steel and Panhandle filed answers in opposition to this request on September 29 and 30, respectively. Additionally, on September 30, the State of Michigan and the Michigan Public Service Commission

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> is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs.

Id. (citations omitted).

[95] *See e.g.* Interim Rule and Statement of Policy. Order No. 500, Docket No. RM87-34-000, *FERC Statutes and Regulations* ¶ 30,761 (1987).

filed a joint answer in support of MichCon's request for a stay.

We will not stay the effectiveness of the certificate issued in Docket No. CP86-232-000. The standard for issuance of a stay by an administrative agency under the Administrative Procedure Act (APA)[96] is whether justice so requires.[97] In applying the APA standard, we must balance the interests of the party seeking the stay with the overall public interest and determine whether the requesting party will sustain irreparable harm in the absence of a stay.[98] Where this standard is not met, the Commission follows a general policy of denying motions for stays of its orders based on the need for definitiveness and finality in administrative proceedings.[99]

The judge found that the public convenience and necessity required granting Panhandle's request for certificate authorization in Docket No. CP86-232-000.[100] The judge also found that "[t]he potential detriment to MichCon and its customers will occur regardless of whether the application in Docket No. CP86-232-000 is granted because National Steel has other viable supply options . . . ."[101] After reviewing the record evidence, we

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[96] 5 U.S.C. § 705.

[97] *Distrigas Corp. et al.*, 27 FERC ¶ 61,027 (1984). In *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F.2d 921 (D.C. 1985), the United States Court of Appeals for the District of Columbia outlined the standards that a court must consdier to determine whether a stay should be issued. However, we have noted that "[t]he Commission has much broader discretionary power to stay its own orders and is not bound by the criteria respecting court-ordered stay" Regulations Under Sections 110, 105, and 106(b) of the Natural Gas Policy Act of 1978, Docket No. RM80-21, 13 FERC ¶ 61,270, at p. 61,601 (1980).

[98] *Commonwealth Gas Pipeline Corp.*, 29 FERC ¶ 61,054 (1984).

[99] *See, e.g., Arkansas Louisiana Gas Co.*, 23 FERC ¶ 61,324 (1983).

[100] 38 FERC at p. 65,076.

[101] *Id.*

affirmed the judge's findings.[102] No arguments were made, either in the various rehearing requests, the motion requesting a stay, or the various answers to that stay request, which persuade us to reverse those findings.[103]

Accordingly, MichCon's request for a stay is denied. We note, however, that on October 1, 1987, a United States District Court Judge for the Western District of Michigan orally granted MichCon's request for an injunction preventing Panhandle from providing the transportation authorized in Docket No. CP86-232-000.[104]

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[102] 40 FERC at p. 61,752.

[103] MichCon's argument in support of its request for a stay, in essence, is the following:

> The affected parties can be expected to initiate costly and burdensome actions in the absence of a stay. Indeed, litigation in courts pertinent to the proposed bypass has already been precipitated by the issuance of Opinion No. 275-A less than one week ago. The Commission, in the exercise of its administrative discretion, will likely avoid great additional expense and effort by concerned parties through issuance of a stay.

MichCon's stay request at 4-5. We do not find this argument persuasive.

[104] We note, however, that on September 14, 1987, MichCon filed a complaint in state court, alleging that Panhandle was unlawfully atempting to bypass MichCon without seeking the necessary state approval, and seeking injunctive relief. Subsequently, that case was removed to the United States District Court for the Eastern District of Michigan. Also on September 14, Panhandle and National Steel filed a complaint against the Michigan Public Service Commission in the United States District Court for the Western District of Michigan, urging that state body lacked any authority to regulate the bypass transportation, and seeking a permanent injunction against any such state regulation. On September 25, the two cases were consolidated before a federal district judge in the Western District. On October 1, 1987, the district judge held a hearing and orally granted MichCon's request for an injunction against the by-pass by Panhandle, pending resolution on the merits.

C. Sole Supplier Clause

In his initial decision, the judge noted that as the proceedings progressed through the administrative hearing process, several major issues had evolved. He described one issue as follows:

> Another issue is raised by the Central Illinois Light Company (CILCO) and Michigan Gas Utilities Company (MGU) (hereinafter referred to only as CILCO since the parties took a joint position in the cause). CILCO contends that the transportation policy of Panhandle is unduly discriminatory since Panhandle will not transport gas for system supply for its General Service (G rate) customers, such as CILCO, because of a misinterpretation by Panhandle of Section 1.9 of its tariff.[105]

The judge found that Panhandle's interpretation of section 1.9 of its tariff was reasonable and non-discriminatory.[106] Subsequently, in Opinion No. 265 (a Panhandle rate case),[107] we concluded that "the sole supplier clause provision in the definition of a General Service customer in section 1.9 is unjust and unreasonable and should be removed."[108] Accordingly, in Opinion No. 275-A we stated:

> Since the issues resolved in Opinion No. 265 are now finalized, there is no longer any impediment to Panhandle's transporting gas for the system supply of its full requirements customers. Moreover, since Panhandle is currently transporting under NGPA section

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[105] 38 FERC at p. 65,031.

[106] *Id.* at p. 65,076.

[107] Docket No. RP82-58-000 *et al.*, 38 FERC ¶ 61,164 (1987).

[108] *Panhandle Eastern Pipe Line Co.*, Docket No. RP82-58-000 *et al.*, 38 FERC ¶ 61,164 (1987), *reh'g denied*, Opinion No. 265-A, 40 FERC ¶ 61,189 (1987), *pet. for review filed*, *Panhandle Eastern Pipe Line Co. v. FERC*, No. 87-1431 (D.C. Cir. August 26, 1987).

> 311, it is required to transport gas for its G rate customers under the non-discriminatory access provisions of sections 284.8 and 284.9 of our regulations.[109]

Both Panhandle and CILCO have filed requests for rehearing on this issue.

Panhandle argues that we erroneously applied our conclusion in Opinion No. 265 to the instant proceeding. To support its argument, Panhandle states that "the Presiding Judge relied on independent evidence presented in this case to support his crucial findings." [110] This contention does not survive inspection.

In his initial decision, the judge stated:

> To determine whether this [*i.e.*, Panhandle's policy not to offer any transportation service for the system supply of its G rate customers] is an appropriate transportation policy, it is necessary to delve into the rationale employed by Panhandle to justify this interpretation. To do this, a helpful place to begin is to consider the findings and rulings made in Panhandle's latest rate case where the Section 1.9 tariff interpretation was thoroughly considered.[111]

After a lengthy discussion of the initial decision in Panhandle's rate case, the presiding judge in the instant proceeding noted:

> In the present case, Judge Liebman's thorough analysis that has been set out above establishes the differences involved in providing full and partial requirements services on Panhandle's system. In addition there was independent evidence at hearing show-

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[109] 40 FERC at p. 61,755 (footnote omitted).

[110] Panhandle's request for rehearing of Opinion No. 275-A at 13 (citing 38 FERC at pp. 65,049, 65,051, 65,052).

[111] 38 FERC at p. 65,049.

> ing the differences between customer classes and contractual benefits of the full requirements customers.[112]

It seems clear to us that the judge's reference to "independent evidence" was used primarily to support the proposition that his findings did not rely solely on the discussions in the initial decision of the rate case, although neither the judge nor Panhandle indicates specifically what evidence is referred to. In any event, the reference is beside the point. The issue is whether Panhandle misinterpreted section 1.9 of its tariff and in Opinion No. 265 we required that provision to be removed. Moreover, for the purposes of this proceeding, we take official notice of the record developed in Docket No. RP82-58-000 *et al.*, that is, Panhandle's rate case. After reviewing the record evidence and considering Panhandle's arguments, we see no reason to reverse our decision on this issue.[113] Accordingly, Panhandle's request is denied.

Panhandle also requests rehearing of a portion of footnote 30 in Opinion No. 275-A which, in pertinent part, provides:

> The pertinent language in 1.8 of Panhandle's tariff for SG rate customers (full requirements customers having a contract demand of less than 10,000 Mcf during every month of the year) is identical to the language in § 1.9. For the sake of simplicity we will only address the § 1.9 issue, but the determinations

[112] *Id.* at p. 65,051.

[113] Panhandle also argues that we erroneously applied the conclusion of Opinion No. 265 to the instant proceeding because "while the Commission has denied rehearing of Opinion No. 265 and a petition for review has been filed, the Commission still retains jurisdiction over the case and may, as Section 19(a) of the Natural Gas Act makes clear, modify or set aside the order." Panhandle's rehearing request at 13. This argument is untenable. Opinion No. 265 is a final order of the Commission. See Opinion No. 265-A, 40 FERC ¶ 61,189 (1987).

> that we make will be considered equally applicable to § 1.8 of the tariff.[114]

Subsequent to issuing Opinion No. 275-A, we clarified Opinion No. 265 by stating that "we were not ruling on the propriety of Panhandle's SG rate schedule." [115] In light of this clarification, we now vacate that portion of footnote 30 which is quoted above. We note, however, that this action is without prejudice to any future challenges to sole supplier provisions applicable to Panhandle's SG customers.

Finally, CILCO requests rehearing of Opinion No. 275-A so that we may "decide the sole supplier interpretation issue on the merits in CILCO's favor unless the revised language in Opinion No. 265 is made effective February 20, 1987." [116] In Docket No. RP87-103-000,[117] we accepted, effective August 19, 1987, the changes to Panhandle's tariff, as ordered in Opinion No. 265.[118]

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[114] 40 FERC at p. 61,759. Similarly, the judge noted: "While the decision will, for the purposes of simplicity only address the section 1.9 issue, its determinations must be considered equally applicable to section 1.8. Both Sections 1.8 and 1.9 are in the record as part of CILCO Ex. 37." 38 FERC at p. 65,047.

[115] 40 FERC at p. 61,601.

[116] CILCO's rehearing request at 6.

[117] 40 FERC ¶ 61,369 (1987).

[118] *Panhandle Eastern Pipe Line Co.*, Docket No. RP87-103-000, 40 FERC ¶ 61,369 (1987). In Opinion No. 265, we required that "Panhandle's tariff be modified prospectively from the effective date of this order so that the two provisions read as follows:

> 1.9 *General Service Buyer.* General Service buyer is any buyer which purchases gas from seller under seller's General Service rate schedule.
>
> 1.10 *Limited Service Buyer.* Limited Service buyer is any buyer which purchases gas from seller under seller's Limited Service rate schedule.

38 FERC at pp. 61,470-01.

CILCO maintains that it was aggrieved by virtue of the tariff provisions' effective date being August 19 rather than February 20, 1987 (the date Opinion No. 265 was issued). We do not believe that such arguments properly lie in this proceeding.

Our decision to eliminate Panhandle's sole supplier clause is the result of a complaint that CILCO filed against Panhandle under section 5 of the NGA.[119] Remedies under section 5 are prospective only.[120] Inasmuch as Opinion No. 275-A was issued after the tariff provisions became effective, this proceeding is not the proper forum in which to challenge the effective date of the tariff. Moreover, we note that the General Service Customer Group, of which CILCO is a member, raised this issue in a request for rehearing of the order issued in Docket No. RP87-103-000. Accordingly, CILCO's request is denied.

The Commission orders:

(A) The various requests for rehearing and clarification of Opinion Nos. 275 and 275-A are denied or granted to the extent discussed above. Any requests not discussed above are denied.

(B) Ordering Paragraph (B) of Opinion No. 275-A is amended so that Panhandle is authorized to provide the transportation described in Docket No. CP86-504-000 until the earlier of one year from the date of issuance of Opinion No. 275-A or the date on which Panhandle accepts a blanket certificate issued under Part 284 of our regulations.

(C) MichCon's request for a stay of the certificate issued in Docket No. CP86-232-000 is denied.

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[119] *E.g.*, 38 FERC at p. 61,451; *see* 15 U.S.C. § 717d (1982).

[120] 15 U.S.C. § 717d (1982).

(D) In positioning shippers on its interruptible transportation queue, Panhandle shall apply the provisions of its PT rate schedule; Panhandle, however, may not position any of the section 7(c) applications granted in Opinion No. 275-A higher on the queue than the repositioned section 311 shippers.

Commissioner Stalon *dissented* in part with a separate statement to be issued later.

Panhandle Eastern Pipe Line Company, Docket No. CP86-232-008

(Issued September 26, 1988)

Charles G. Stalon, Commissioner, dissenting in part:

I dissent from that part of this rehearing order which reaffirms Panhandle Eastern Pipe Line Company's bypass of Michigan Consolidated Gas Company for the same reasons that I opposed the original order issued on September 10, 1987. (*See,* 40 FERC ¶ 61,220 (1987) and the partial dissent of Commissioner Charles G. Stalon issued on September 12, 1988 [44 FERC ¶ 61,410].)

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. CP86-212-000, CP86-486-000, CP86-504-000, CP86-551-000, CP86-573-000, CP86-598-000, CP86-645-000, CP86-665-000, CP86-660-000, CP86-669-000, CP86-670-000, CP86-671-000

PANHANDLE EASTERN PIPE LINE COMPANY

Docket No. CP86-584-000

INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES

v.

PANHANDLE EASTERN PIPE LINE COMPANY

Docket No. CP86-663-000

INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES

v.

COLORADO INTERSTATE GAS COMPANY

Opinion No. 275-A; Opinion and Order Affirming in Part, Reversing in Part, and Modifying Initial Decision

(Issued September 10, 1987)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C.M. Naeve.

Before us are twelve applications filed by Panhandle Eastern Pipe Line Company (Panhandle) for certificates of public convenience and necessity, under section 7(c) of the Natural Gas Act (NGA), authorizing the interruptible transportation of natural gas for various parties. The twelve applications are part of a consolidated proceeding that also included a complaint filed by the Independent Petroleum Association of Mountain States (IPAMS) against Panhandle.[1] The background and issues of this case are set out in an initial decision issued by Administrative Law Judge Daniel M. Head.[2] On June 4, 1987, we issued Opinion No. 275, which affirmed in part, reversed in part, and modified in part, Judge Head's initial decision as to the IPAMS complaint.[3]

In this Opinion, we will address all issues that pertain to Panhandle's applications for section 7(c) authorization. As for these issues, the judge did the following:

(1) Granted Panhandle certificate authorization to transport gas on an interruptible basis on behalf of National Steel Corporation (National Steel), resulting in a bypass of Michigan Consolidated Gas Company (MichCon), a local distribution company

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[1] IPAMS also filed a complaint against Colorado Interstate Gas Company, but that complaint was settled. *See Panhandle Eastern Pipe Line Co., et al.*, Docket No. CP86-232-000, *et al.*, 37 FERC ¶ 61,303 (1986) (approving offer of settlement filed by IPAMS and CIG and terminating Docket No. CP86-663-000).

[2] 38 FERC ¶ 63,009 (1987).

[3] 39 FERC ¶ 61,274 (1987) (finding that Panhandle had engaged in undue discrimination by providing advance notice to its marketing affiliate and certain on-system customers of the pipeline's plans to initiate interim section 311 transportation). A list of parties that filed briefs on exception and briefs opposing exceptions to the initial decision is found at 39 FERC at p. 61,907.

(LDC) that is a partial requirements customer of Panhandle.

(2) Determined that the sole supplier clause of section 1.9 of Panhandle's tariff excluded the transportation of gas for system supply for its full requirements (G rate) customers, and as a result, found that Panhandle did not discriminate against those customers in denying them transportation so long as they elect to continue to receive service under that schedule;

(3) Found that Panhandle's twelve section 7(c) applications did not demonstrate a pattern of undue discrimination and granted certificate authority conditioned upon Panhandle's complying with the *Southern Natural* log and policy statement requirements.[4]

After reviewing the record,, we find that the exceptions, for the most part, made arguments that the judge discussed adequately and resolved appropriately. However, we find that certain exceptions to the second point have merit, and that certain other relatively minor modifications to the initial decision are appropriate. Accordingly, we will affirm the initial decision as to the first and third points, reverse as to the second, and adopt the initial decision as to all issues that we do not discuss here.

I. Bypass

In Docket No. CP86-232-000, Panhandle filed an application requesting certificate authorization for the interruptible transportation of up to 67,000 Mcf per day for National Steel, an end-user. The judge found that granting the application "will by-pass any sales of gas by MichCon to National Steel and will by-pass the gas transportation services MichCon is currently providing

[4] *See Southern Natural Gas Co., et al.*, Docket No. CP86-277-001, *et al.*, 36 FERC ¶ 61,275 (1986).

to National Steel by displacing those transportation arrangements."[5] Nevertheless, the judge made the following conclusions: (1) the granting of the application is required by the public convenience and necessity; (2) the potential detriments to MichCon and its customers will occur even if the application is denied because National Steel has other viable supply options; and (3) the potential detriments to MichCon's customers from granting the application are speculative, "since MichCon would not file for a rate increase with the Michigan Public Service Commission [(MPSC)] solely from the loss of National Steel's load."[6] Several parties, most notably MichCon, have raised exceptions to these three conclusions.[7]

MichCon contends that the judge erred in finding that the proposed bypass is required by the public convenience and necessity. In its brief on exceptions, MichCon contends that our policy is to favor service to industrial customers by local distribution companies.[8] Accordingly, MichCon urges us to follow that policy here. We are not persuaded by MichCon's argument.

Although we have indicated a preference for service to industrial customers by LDC's we have made clear that we would not rigidly follow that rule, but rather examine the individual circumstances of each before applying the policy.[9] In *American Distribution Company (Ala-*

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[5] 38 FERC at p. 65,076.

[6] *Id.*

[7] *See* Briefs on Exceptions filed by MichCon, Michigan, and Storage Company.

[8] MichCon's Brief on Exceptions at 6 (citing, *Panhandle Eastern Pipe Line Co.*, 36 FPC 1107, 1109 (1966), *modified* 37 FPC 314 (1967), *aff'd sub nom. Panhandle Eastern Pipe Line Co. v. FPC*, 386 F.2d 607 (3rd Cir. 1967).

[9] *See Panhandle Eastern Pipe Line Co.*, 29 FERC ¶ 61,338, at p. 61,709 (1984); *Missouri Edison Co.*, 47 FPC 849, 851 (1972).

bama Division), Docket No. CP86-263-000,[10] we granted an interstate pipeline certificate authorization to transport natural gas on behalf of an industrial end-user, even though the service would bypass an LDC.[11] In that case we stated:

> In a competitive market environment, the parties are at a risk for their own decisions, and the need to provide competitive services is the factor that leads to improved service at lower cost for consumers. * * * Under these circumstances, and in the absence of any suggestion of unfair competition, we believe that the public interest is best served by our sustaining the result of that competition.[12]

We see no reason to deviate from our belief that competition best serves the public interest, especially in light of the fact that the judge found that "[t]he potential detriments to MichCon and its customers will occur regardless of whether the application in Docket No. CP86-232-000 is granted because National Steel has other viable supply options . . . ."[13] Accordingly, we affirm the judge's conclusions on these issues. However, MichCon does raise three issues which merit further attention.

First, MichCon proposed that any certificate issued to Panhandle in Docket No. CP86-232-000 should be conditioned to require the pipeline to credit MichCon's minimum bill, a significant portion of which is attributable

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[10] 37 FERC ¶ 61,282 (1986).

[11] *American Distribution Co. (Alabama Division)*, Docket No. CP86-263-000, 37 FERC at p.61,856 (1986). Prior to the bypass, the industrial enduser, Kerr-McGee Chemical Corporation, was the largest customer of the LDC, Mobile Gas Service Corporation. *Id.* at p. 61,852.

[12] *Id.* at pp. 61,854-55.

[13] 38 FERC at p. 65,076.

to MichCon's service obligations to National Steel. After noting that the initial decision in Panhandle's last rate case eliminated the pipeline's minimum commodity bill[14] and that our current policy is to sustain elimination of the minimum bill,[15] the judge concluded that "there appears to be no need for the issuance of any minimum bill crediting because MichCon in the future will not be subject to minimum bill charges by Panhandle."[16] In its brief on exceptions, MichCon argues that "[i]t is neither sensible nor responsible for the Commission to defer that action on the basis that it might be done in another proceeding. . . ."[17] The argument is now moot. In Opinion No. 265 we eliminated Panhandle's minimum commodity bill from the pipeline's tariff.[18]

Second, MichCon proposed that a certificate issued to Panhandle "should be conditioned on a cancellation or reduction of MichCon's contract demand (with a concomitant reduction of MichCon's fixed cost obligation) equivalent to the maximum level of the interruptible service proposed to be provided to National Steel. . . ."[19] After noting that the contract demand reduction is a condition of Order No. 436 that a pipeline must accept

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[14] *See Panhandle Eastern Pipe Line Co., et al.*, Docket No. RP82-58-000, *et al.*, 32 FERC ¶ 63,085, at p. 65,311 (1985) [hereinafter cited as Rate Decision].

[15] *See ANR Pipeline Co.*, Docket No. RP82-80-000, *et al.*, 37 FERC ¶ 61,263, at p. 61,755 (1986) (reversing the judge's determination that ANR's fixed cost minimum bill is just and reasonable and finding that the minimum bill is unlawful and should be eliminated).

[16] 38 FERC at p. 65,045.

[17] MichCon's Brief on Exceptions at 39.

[18] *Panhandle Eastern Pipe Line Co., et al.*, Opinion 265, Docket No. RP82-58-000, *et al.*, 38 FERC ¶ 61,164 (1987), *reh'g denied*, Opinion No. 265-A, 40 FERC ¶ 61,189 (1987).

[19] 38 FERC at p. 65,045 (citing MC Ex. 6, pp. 22-23); *see* MichCon's Brief on Exceptions at 38-39.

in order to obtain a blanket transportation certificate, the judge stated:

> However, the Commission has not required that the contract demand reduction condition be attached to regular Section 7(c) certificates. *See*, for example, *Southern Natural Gas Company*, 36 FERC ¶ 61,275, at pp. 61,677-78 (1986), where such a proposal was brought up but was not adopted by the Commission. Moreover, if approval of the application for blanket certificate transportation authority under Order No. 436 is granted to Panhandle in Docket No. CP86-585-000, which is currently under review by the Commission, MichCon, like Panhandle's other customers, will have an opportunity to reduce its contract demand or to convert a portion of its contract demand to transportation services. Therefore, it would not be equitable to provide MichCon with an option herein that is not available to other customers.[20]

We agree with the judge, albeit for different reasons, that Panhandle should not be required to reduce MichCon's contract demand.

The instant case, which involves an application for transportation authorization, is not a proper context in which to require a pipeline to reduce an LDC-customer's contract demand. In *Associated Gas Distributors v. FERC*,[21] the United States Court of Appeals for the District of Columbia Circuit concluded that we could not properly ground the contract demand conversion/reduction options of Order No. 436 in section 7 of the NGA.[22] The court stated that, to find any support for

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[20] 38 FERC at p. 65,045.

[21] No. 85-1181 (D.C. Cir. June 23, 1987).

[22] *Associated Gas Distributors v. FERC*, No. 85-1181, slip op. at 61-63 (D.C. Cir. June 23, 1987).

our relieving customers of the contract obligations, "it appears we must turn to 5 of the NGA, which allows the Commission to set aside any unjust, unreasonable or unduly discriminatory contract affecting rates and charges." [23] Moreover, even if we had section 7 conditioning authority to reduce MichCon's contract demand with Panhandle in the context of the case before us, we are not convinced that any reduction is necessary. In Opinion No. 265-A, we determined that Panhandle's customers could renominate their entitlements under the D-2 billing component used to determine contract demand.[24] We believe that this action significantly ameliorates any pur-

[23] *Id.* at 62; *see* 15 U.S.C. S 717d (1982). In reaching its conclusion, the court in *Associated Gas Distributors* relied heavily on a case restricting our power to impose section 7(e) conditions. *See* No. 85-1181, slip op. at 60-63; *Panhandle Eastern Pipe Line Co. v. FERC,* 613 F.2d 1120, 1130 (D.C. Cir. 1979) ("we hold that that FERC may not as a condition on a section 7 certificate require a pipeline to adjust rates previously approved by the Commission for customers not receiving the services to be certificated.") (footnote omitted), *cert. denied,* 449 U.S. 889 (1980); *Northern Natural Gas Company, Division of InterNorth, Inc. v. FERC,* No. 85-1045 (August 21, 1987) (reaffirming en banc the court's decision in *Panhandle*). Accordingly, in regard to contract demand adjustments, the court stated:

> In the present case, the Commission's creation of CD conversion/reduction often similarly modifies previously approved arrangements that are separate from the transportation authority that a pipeline would seek under Order No. 436. On its face, it appears to challenge *Panhandle's* strictures against extensions of the section 7(e) conditioning power that would erode substantive or procedural limits on the Commission's power.

No. 85-1181, slip op. at 61. *See* 15 U.S.C. 717f(e) (1982). The statute, in pertinent part, provides: "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." *Id.*

[24] *Panhandle Eastern Pipe Line Co., et al., see Docket* No. RP82-58-011, *et al.,* 40 FERC ¶ 61,189 (1987).

ported need for MichCon to reduce its contract demand in the context of the proceeding pending before us.[25]

Third, MichCon excepts to three procedural rulings of the judge which, according to MichCon, denied it due process of law. These rulings denied the following: (1) MichCon's request for the identification of the potential supplier of Canadian gas that could be used by National Steel as an alternative source to meet the company's energy needs; (2) the admission into evidence of excerpts of three depositions that MichCon had conducted on various National Steel officials; and (3) MichCon's request for an adjournment of the hearing, during which time MichCon proposed to conduct depositions of various Panhandle officials concerning the pipeline's interpretation of section 1.9 of its tariff, or, in the alternative, issuance of trial subpoenas of the officials.[26]

In its brief on exceptions, MichCon has raised no issues that the judge did not adequately discuss when making his decision on both the first (tr. 1312) and third (tr. 1815-16) ruling. Accordingly, we will not upset the judge's rulings on those issues.

We now turn to the judge's denying admission into evidence of excerpted portions of three depositions of National Steel officials. As a general rule, depositions before an administrative agency are used for only two purposes: (1) general discovery purposes (that is, to assist in preparation for litigation); and (2) the preservation of evidence of a witness who may not be available at the hearing.[27] Furthermore, Rule 405 of the Commis-

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[25] We stress that our decision herein is limited to declining to attach a condition to the certificate, and is without prejudice to consideration of contract demand reduction in the event that Panhandle or MichCon raise that issue in an appropriate proceeding.

[26] MichCon's Brief on Exceptions at 88-92; *but see* National Steel's Brief Opposing Exceptions.

[27] J. Stein, G. Mitchell, B. Mezines, *Administrative Law* § 23.0[2] (1977) *citing Carl W. Alson & Sons Co.*, 34 Ad.L.2d 103 (Interior

sion's then existing Rules of Practice and Procedure, in pertinent part, provides:

> The deposition of any witness, whether or not a participant, may be used by a participant for any purpose, if the presiding officer finds that:
>
> (i) The witness is dead;
>
> (ii) The witness is unable to attend or testify because of age, illness, infirmity or imprisonment;
>
> (iii) The participant offering the deposition is unable after the exercise of due diligence to procure the attendance of the witness by subpoena; or
>
> (iv) Exceptional circumstances make it necessary in the interest of fairness with due regard to the importance of presenting the witness in open hearing, to allow use of the deposition.[28]

Against this backdrop, the judge explained his ruling as follows:

> And since we operate on the basis that we have our prefiled direct and reply testimony, it would appear to me that MichCon is now too late in coming in on the day of hearing and indicating that it

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Department Board of Contract Appeals 1973) (holding that depositions may only be taken for discovery purposes, and *not also for evidentiary purposes,* when the persons to be examined will be available for hearing) (emphasis added); Tomlinson, *Discovery in Agency, Adjudication,* 1971 Duke L.J. 89,103 (1971) ("While the great majority of agencies do have rules providing for the taking of depositions, these rules generally do not authorize discovery depositions but *only provide for depositions to preserve testimony of a witness who is near death, about to leave the country, or for some other reason unlikely to testify at the hearing.*") (emphasis added).

[28] 18 C.F.R. § 385.405(a)(3) (1986); *see* Rules of Discovery For Trial-Type Proceedings. Docket No. RM83-41-1000, Order No. 466, 52 Fed. Reg. 6957 (1987). *FERC Statutes and Regulations* ¶ 30,731. The quoted portion of rule 405(a)(3) is not amended by Order No. 466.

> intends to present portions of depositions, even though they might have qualified as admissible against the party opponent, that it did not include in any way, shape or form in its refiled testimony, giving the party opponent the opportunity to either rebut that testimony if it was filed as direct or at least make a motion to bring the witnesses in to have direct live testimony concerning the areas of the depositions which, as I understand it, were discovery depositions.[29]

In light of the aforementioned rules, and because we find the judge's reasoning sound, we will not disturb his ruling.

II. Section 1.9 of Panhandle's Tariff—Sole Supplier Clause

The Central Illinois Light and Gas Company and the Michigan Gas Utilities Company (CILCO) have filed a joint brief which attacks Panhandle's interpretation of section 1.9 of its tariff.[30] Panhandle maintained that the

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[29] Tr. 1620.

[30] *See* Brief on Exceptions filed by CILCO. Section 1.9 of Panhandle's tariff provides:

> General Service Buyer is any buyer which does not purchase gas from any other natural-gas company, as defined in the Natural Gas Act, for distribution in areas served with Seller's gas; provided, however, a Buyer under the General Service Rate Schedule which seeks from Seller an increase in contract demand and seller is unable to supply the increase in contract demand, then such Buyer may purchase natural gas from other natural-gas companies but shall remain a General Service Buyer under this tariff.

The pertinent language in § 1.8 of Panhandle's tariff for SG rate customers (full requirements customers having a contract demand of less than 10,000 Mcf during every month of the year) is identical to the language in § 1.9. For the sake of simplicity we will only address the § 1.9 issue, but the determinations that we make will be considered equally applicable to § 1.8 of the tariff.

sole supplier clause in section 1.9 excluded the transportation of gas for its full requirements (G rate) customers if the gas transported would be used for system supply. Panhandle claimed that it would not refuse to transport gas for system supply of a G rate customer, but that if it does so, then the customer must give up the preferred G rate status and become a partial requirements customer under the LS rate schedule.

CILCO, however, contends that since switching to the partial requirements rate schedule is cost prohibitive, Panhandle is effectively refusing to transport gas for the system supply of its captive customers. Thus, the essence of CILCO's complaint is that Panhandle's interpretation is nothing more than a facade to mask Panhandle's genuine concern that any new transportation service not displace sales to its captive sales markets. CILCO argues not only that this is discriminatory in violation of section 311 of the Natural Gas Policy Act of 1978 (NGPA),[31] under which Panhandle has been transporting since April 21, 1986, but also that it is an attempt to evade the nondiscriminatory requirements of Order No. 436.[32] As a result, CILCO requests that any certificates issued in this proceeding be conditioned to require Panhandle to transport gas for the system supply of its G rate customers.

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[31] 15 U.S.C. 3371 (1982).

[32] *See* Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 436, *FERC Statutes and Regulations, Regulation Preambles 1982-1985* ¶ 30,665 (1985), *modified,* Order No. 436-A, *FERC Statutes and Regulations. Regulations Preambles 1982-1985* ¶ 30,675 (1985), *modified further,* Order No. 436-B, *FERC Statutes and Regulations* ¶ 30,688, *reh'g denied,* Order No. 436-C. 34 FERC 61,404, *reh'g denied,* Order No. 436-D, 34 FERC ¶ 61,405, *reconsideration denied,* Order No. 436-E, 34 FERC ¶ 61,403 (1986), *vacated and remanded sub nom., Associated Gas Distributors v. FERC,* No. 85-1181 (D.C. Cir. June 23, 1987) (generally upholding the substance of Order No. 436 and the procedures employed in adopting it, but finding problems with certain issues and vacating and remanding the matter for further proceedings). As

In the alternative, CILCO asks us to interpret section 1 to allow G rate customers to purchase natural gas supplies that have been certificate deregulated by section 601 of the NGPA,[33] since producers or resellers affected by the statute are not "natural gas companies as defined by the Natural Gas Act" and purchases of gas from them would not then offend the tariff's sole supplier clause.

After a lengthy discussion, the judge found that Panhandle's interpretation of section 1.9 of its tariff, to preclude its full requirements SG rate and G rate customers from having gas transported for their system supply unless those customers become partial requirements LS rate customers, was reasonable and non-discriminatory.[34] In coming to this conclusion, the judge relied heavily on the initial decision in Panhandle's most recent rate case.

However, on February 20, 1987, almost a month after the presiding judge in the instant proceeding issued his initial decision, we issued Opinion No. 265, which reversed the above-described conclusion made in the rate case's initial decision.[35] In that Opinion, we concluded as follows:

> [T]he sole supplier provision in the definition of a General Service customer in section 1.9 is unjust and unreasonable and should be removed. Moreover, purchases from one or more suppliers other than Panhandle should also be changed to be consistent with

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of this date, the Court's mandate has not issued, and the regulations promulgated by Order No. 436 are still in effect. However, on August 7, 1987, we issued Order No. 500, which promulgated interim regulations in response to the court's remand. *See* Interim Rule and Statement of Policy Docket No. RM-87-34-000, ***FERC Statutes and Regulations*** ¶ 30,761 (1987). These regulations will become effective upon issuance of the mandate or upon leave of the court.

[33] 15 U.S.C. § 3431 (1982).

[34] 38 FERC at p. 65,076.

[35] *See* Opinion No. 265, 38 FERC ¶ 61,164.

> section 1.9. Section 1.10 was intended to cover only those customers who were barred from the G Rate Schedule by reason of their purchasing gas from other pipelines. Now that the sole supplier barrier has been removed from the G Rate Schedule, section 1.10, as it currently reads, would also apply to a buyer under modified section 1.9.[36]

Since the issues resolved in Opinion No. 265 are now finalized, there is no longer any impediment to Panhandle's transporting gas for the system supply of its full requirements customers.[37] Moreover, since Panhandle is currently transporting gas under NGPA section 311, it is required to transport gas for its G rate customers under the non-discriminatory access provisions of sections 284.8 and 284.9 of our regulations. Accordingly, it is unnecessary for us to discuss whether section 1.9 allows G rate customers to purchase gas that has been certificate deregulated by section 601 of the NGPA.

III. Section 7(c) Applications

For purposes of review, we note that the initial decision states:

> These consolidated proceedings involve 12 separate applications by Panhandle to provide interruptible transportation service for varying terms for one or more shippers. These applications, as amended, involve 150 transportation agreements for combined maximum daily contract quantities of approximately 1 Bcf per day. The specific shippers include direct end-users, LDCs and the end-users they serve, producers, interstate and intrastate pipelines.[38]

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[36] *Id.* at p. 61,470.

[37] Since we denied rehearing of Opinion No. 265, the issues resolved in the opinion are now finalized. *See* Opinion No. 265-A, 40 FERC ¶ 61,189 (1987).

[38] 38 FERC at p. 65,068.

In our Hearing Order in these proceedings, we directed the judge to consider, among other things, the following issues:

> Whether Panhandle's transportation policies have been or currently are unduly discriminatory. Whether Panhandle's section 7(c) applications demonstrate a pattern of undue discrimination by favorin a particular group of shippers, by treating similarly situated shippers differently, by favoring fuel-switchable end-users or by denying shippers access to transportation in an unduly discriminatory manner.[39]

The judge found that "[e]xcept as set out in Finding 7 above [Panhandle's responsibility for Panhandle Trading Company's having advance notice of plans to initiate interim transportation], Panhandle's transportation policies have not been, nor are they currently, unduly discriminatory." [40] Several parties except to this finding.[41] However, they raise no issues that the judge did not adequately address in his initial decision. Accordingly, we will affirm the judge on this point, but we will modify his analysis to the extent indicated below.

First, as the judge properly noted, a major argument raised against these applications is that Panhandle is discriminating against its G rate customers by denying them transportation of gas for system supply because of the pipeline's interpretation of section 1.9 of its tariff. The judge summarily treated the contention by stating, "This argument has already been rejected in Section II, *supra*, and need not be revisited at this juncture." [42] For a different reason, we agree with the judge. As discussed above, in Opinion No. 265, we removed the sole supplier

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[39] 36 FERC ¶ 61,282, at p. 61,701 (1986).

[40] 38 FERC at pp. 65,076-77.

[41] *See* Briefs on Exception filed by Columbia and IPAMS.

[42] 38 FERC at p. 65,069.

clause of section 1.9 of Panhandle's tariff because it was anticompetitive on its face.[43] However, for the reasons discussed in Section II, *supra*, neither will we revisit the issue.

Second, concerning Panhandle's PT Rate Schedule, the judge made the following determinations: (1) The rates were appropriate for purposes of determining whether the pipeline's section 7(c) certificate authorizations should be granted; and (2) the certificate authorizations would be conditioned upon the outcome of the proceedings in Docket No. RP86-116-000, in which Panhandle's PT rates are at issue.[44] We agree with the judge.

However, several parties have filed exceptions to that portion of the initial decision in which the judge found that "[i]t was established that the PT rates are fully allocated, 100% load factor rates based on a representative level of transportation (Panhandle Ex. 8, p. 27; Tr. 2115)."[45] The parties argue that the above finding relies wholly on the unsupported, rebuttal testimony of Mr. M. D. Bray, Vice President—Regulatory Affairs for Panhandle. We find their arguments persuasive. We can find no evidence in the record that reflects how the PT rates were derived, how costs were allocated, or what levels of transportation volumes were used. Moreover, these issues were subsequently determined in Docket No. RP86-116-000, *et al.*, in which we made the following finding:

> [T]he PT rate schedule violates section 284.7 of our regulations and is therefore not appropriate for use

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[43] Opinion No. 265, 38 FERC at pp. 61,469-71.

[44] 38 FERC at p. 65,071; *see Panhandle Eastern Pipe Line Co.*, Docket No. RP86-116-000, 35 FERC ¶ 61,401 (1986) (order accepting for filing and suspending tariff sheets subject to refund and conditions and establishing a technical conference).

[45] 38 FERC at p. 65,070; *see* Briefs on Exceptions filed by MichCon and Staff.

> as an Order No. 436 rate. Our decision is based on our determination that the PT rate schedule does not reflect projected units of transportation volumes and is not based on the proper allocation of costs to the services to which the rate applies, as required by Order No. 436. We are therefore terminating use of the PT rate schedule for Order No. 436 transportation, and are establishing a hearing in the proceedings in Docket Nos. RP86-116-000, -002, -004, and -006.[46]

In Docket No. RP86-116-000, however, we also noted that "Panhandle currently has ongoing section 7(c) certificates in effect that utilize the PT rates subject to the outcome of the proceeding in Docket No. RP86-116-000. In order to avoid an interruption in the authority conferred by these certificates, we find that it is in the public convenience and necessity to allow Panhandle to continue charging the PT rates for transportation under those certificates until such time as we have accepted new tariff sheets filed by Panhandle that conform to the requirements of Order No. 436. . . ." [47]

Accordingly, we also find that it is in the public convenience and necessity to allow Panhandle to charge the PT rates for the transportation services proposed in the 12 section 7(c) applications. However, we will require that in the event Panhandle files tariff sheets in conformance with the requirements of Part 284, Panhandle must make an appropriate filing to conform its section 7(c) certificate rates to those approved under Part 284 of our regulations within 30 days of our acceptance of those tariff sheets.

Third, nine of the twelve applications for certificate authorization were filed pursuant to transportation agreements which provided that the proposed service would

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[46] 39 FERC ¶ 61,101, at p. 61,307 (1987).

[47] *Id.*

terminate upon a designated date or "thirty days following Panhandle's acceptance of a blanket certificate under Order No. 436." The judge determined that "[t]his condition appears to be a reasonable and equitable approach to avoid future controversy over capacity priorities if Panhandle accepts the Order No. 436 blanket certificate." [48] Accordingly, the judge conditioned the remaining certificates to be issued in dockets as follows:

> As an alternative to the specific length of the terms for service provided for in Docket Nos. CP86-232-000, CP86-645-000 and CP86-660-000, the respective certificates issued in those dockets shall terminate 30 days following Panhandle's acceptance of an Order No. 436 blanket certificate.[49]

Recently, in *National Fuel Gas Supply Corp., et al,* Docket No. CP85-826-002, *et al.,*[50] we amended four section 7(c) transportation certificates to provide that the certificates remain in effect until the earlier of a specified date, or the date on which the applicant accepts a blanket certificate (rather than 30 days after the issuance of a blanket certificate to the applicant).[51] We amended the certificates because we foresaw a possible lapse in the pipeline's transportation authority that could occur if it failed to accept an order issuing a blanket certificate while seeking rehearing of the order.[52] For the same reasons, we will condition the twelve certificates in the instant proceeding to remain in effect until the earlier of a specified date on the contract, or the date on which Panhandle accepts a blanket certificate under Part 284

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[48] 38 FERC at p. 65,073.

[49] *Id.* at p. 65,077.

[50] 38 FERC ¶ 61,031 (1987).

[51] *National Fuel Gas Supply Corp., et al.,* Docket No. CP85-826-002, *et al.,* 38 FERC 61,031, at pp. 61,086-87 (1987).

[52] *Id.* at p. 61,086.

of our regulations. However, in no case shall the term be longer than one year from the date this order is issued.

On August 6, 1987, the Independent Petroleum Association of Mountain States filed a motion for clarification of the "repositioning" remedy ordered in Opinion No. 275. Specifically, the motion states: "IPAMS requests that all transportation requested prior to May 21, 1986 be accorded the same priority date, regardless of whether such transportation was to be performed under section 7(c) or section 311(a)(1). In this manner, the Panhandle queue can be cleared of the effects of Panhandle's prior discriminatory conduct." [53]

We believe that granting these 12 section 7(c) applications should not adversely affect any shippers who were repositioned on Panhandle's section 311 queue by virtue of Opinion No. 275.[54] Before explaining our rationale for this belief, we note that section 7(c) applications and the repositioned section 311 queue both concerned *interruptible* transportation. According to Panhandle's PT rate schedule, the pipeline meshes section 311 requests and section 7(c) requests for transportation into a single queue.

A shipper's position on Panhandle's interruptible transportation queue is determined by the date on which the

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[53] IPAMS motion for clarification at 1.

[54] In Opinion No. 275, we stated:

> Effective on the date of issuance of this order, for the purposes of the section 311 transportation queue, Panhandle will treat all shippers who requested interim transportation by May 21, 1986 as if they had all requested such transportation on the same day. . . .

39 FERC at p. 61,907. Our staff has been informed that Panhandle has complied with the repositioning.

pipeline receives a valid request for transportation.[55] There are two exceptions to this rule. One, if the request concerns existing service that was authorized or performed prior to July 1, 1986, then the date of the request is either the date on which service was first authorized by us or performed by Panhandle on a self-implementing basis.[56] Two, the assigned date for new service expires after 90 days unless service is commenced; if the assigned date expires, the shipper may make another request.[57]

Two section 7(c) applications request authorization for existing services: (1) Docket No. CP86-504-000 concerns 39 shippers who previously had 185,250 Mcf per day transported under section 7(c); and (2) Docket No. CP86-573-000 concerns 90 shippers who previously had 529,058 Mcf per day transported under section 311. Accordingly, after we grant Panhandle certificate authorization to continue the services, these 129 shippers would appear to retain the same place on the interruptible transportation queue. The remaining shippers for whom Panhandle has requested section 7(c) transportation authorization would be positioned on the queue based on the date that they requested transportation. As noted above, these shippers' request dates would have expired

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[55] Section 6.10(a)(2) of Panhandle's Rate Schedule PT provides: Requests for quantities of interruptible service will be next fulfilled, commencing with service to be charged at the maximum rate of Transporter then in effect under this tariff in sequence starting with the earliest date of request for such service: next in order shall be service to be charged at a rate that is less than the maximum rate of Transporter then in effect under this tariff in sequence starting with the earliest dates of request for such service, within either sequence of dates capacity will be pro-rated, as necessary, among requests for quantities of interruptible service having the same date of request.

[56] *See* Panhandle's Rate Schedule PT. 6.

[57] *Id.*

after 90 days because such service could not commence without the appropriate certificate authorization. Presumably, the shippers would have filed for new dates, most likely more than once. The bottom line is that, if Panhandle follows the terms of its Rate Schedule PT, these shippers could not possibly have a higher place on the queue than those shippers who were repositioned in the section 311 queue. This is so because the repositioned section 311 shippers all requested service between April 21 and May 21—at least 90 days prior to the date of issuance of this order. Hence, the section 7 shippers would have to have filed their most recent 90-day requests subsequent to the dates on which the repositioned section 311 shippers filed their requests.

The Commission orders:

(A) The initial decision issued in this proceeding is affirmed in part, reversed in part, and modified in part consistent with the terms of this order. All exceptions not granted herein are denied.

(B) A certificate of public convenience and necessity is issued to Panhandle authorizing the transportation of natural gas as described in the initial decision and subject to the conditions specified therein and more fully described in the individual applications on file with the Commission, until the earlier of (1) one year, (2) the specified date on the contract, or (3) the date on which Panhandle accepts a blanket certificate under Part 284 of our regulations.

(C) Panhandle is authorized to charge the PT rates for the transportation services authorized above. However, in the event that Panhandle files tariff sheets in conformance with the requirements of Part 284 and we accept those tariff sheets, Panhandle is required to make an appropriate filing to conform its section 7(c) certificate rates to the tariff sheets accepted under Part 284 of

our regulations, within 30 days of our acceptance of the tariff sheets.

(D) The certificate issued is conditioned upon Panhandle's complying with Part 154 and subsections (a), (c)(3), and (e) of section 157.20 of our regulations.

(E) Panhandle shall maintain its interruptible transportation queue in a manner consistent with the discussion above.

Commissioner Stalon *dissented* with a separate statement to be issued later.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

September 12, 1988

Docket Nos. CP86-232-000, CP86-486-000, CP86-504-000, CP86-551,000, CP86-573-000, CP86-598-000, CP86-645-000, CP86-655-000, CP86-660-000, CP86-670-000, CP86-671-000

PANHANDLE EASTERN PIPE LINE COMPANY

Docket No. CP86-584-000

INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES

v.

PANHANDLE EASTERN PIPE LINE COMPANY

Docket No. CP86-663-000

INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES

v.

COLORADO INTERSTATE GAS COMPANY

TO THE PARTIES ADDRESSED:

Attached is Commissioner Stalon's dissenting statement to the Opinion No. 275-A issued September 10, 1987, in the above referenced proceeding.

/s/ Lois D. Cashell
LOIS D. CASHELL
Acting Secretary

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. CP86-232-000, CP86-486-000, CP86-504-000, CP86-551,000, CP86-573-000, CP86-598-000, CP86-645-000, CP86-655-000, CP86-660-000, CP86-670-000, CP86-671-000

PANHANDLE EASTERN PIPE LINE COMPANY

Docket No. CP86-584-000

INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES

v.

PANHANDLE EASTERN PIPE LINE COMPANY

Docket No. CP86-663-000

INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES

v.

COLORADO INTERSTATE GAS COMPANY

(Issued September 12, 1988)

STALON, Commissioner, *dissenting*:

This case involves twelve section 7(c) Natural Gas Act applications filed by Panhandle Eastern Pipe Line Company (Panhandle) requesting authorization to provide interruptible transportation to 146 shippers.[1] In re-

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[1] As stated in the initial decision, "[t]he twelve section 7(c) applications were originally for transportation on an interruptible basis for over 150 shippers and involved 148 end-users, one producer, three off-system LDCs, and one on-system LDC. However,

sponding to the initial decision of the ALJ, the majority states that it will address all issues that pertain to Panhandle's applications for section 7(c) authorization. As for these issues, the judge did the following:

> (1) Granted Panhandle certificate authorization to transport gas on an interruptible basis on behalf of National Steel Corporation (National Steel), resulting in a by-pass of Michigan Consolidated Gas Company (MichCon), a local distribution company (LDC) that is a partial requirements customer of Panhandle.
>
> (2) Determined that the sole supplier clause of section 1.9 of Panhandle's tariff excluded the transportation of gas for system supply for its full requirements (G rate) customers, and as a result, found that Panhandle did not discriminate against those customers in denying them transportation so long as they elect to continue to receive service under that schedule;
>
> (3) Found that Panhandle's twelve section 7(c) applications did not demonstrate a pattern of undue discrimination and granted certificate authority conditioned upon Panhandle's complying with the *Southern Natural* log and policy statement requirements. (Footnote omitted.)

The Commission further stated,

> After reviewing the record, we find that the exceptions, for the most part, made arguments that the judge discussed adequately and resolved appropriately. However, we find that certain exceptions to the second point have merit, and that certain other

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in Docket No. CP86-504-000 the application was withdrawn by Panhandle for five of the 39 shippers and in Docket No. CP86-573-000, two of the original 92 requests have been withdrawn (Panhandle Ex. 1, pp. 13-14)." *See*, 38 FERC ¶ 63,009 at 65,031.

> relatively minor modifications to the initial decision are appropriate. Accordingly, we will affirm the initial decision as to the first and third points, reverse as to the second, and adopt the initial decision as to all issues that we do not discuss here.[2]

I believe the majority seriously erred in affirming the initial decision as to the first and third points. In fact, the errors are of such magnitude that it is necessary for me to dissent from the entire opinion.

In granting Panhandle's application requesting certificate authority to directly serve National Steel and thus by-pass the facilities on MichCon the majority relied heavily on its "belief that competition best serves the public interest."[3] I too believe that competition best serves the public interest *if* the structure of the marketplace induces constructive competition. The facts of this case show, however, that no such competition exists. In fact, it is difficult to describe the type of competition analyzed in this case as anything other than predatory.

On the one hand, National Steel argues that it can lower its cost of natural gas if Panhandle is allowed to directly serve it. On the other hand, Panhandle refuses to allow MichCon to lower its contract demand with Panhandle to reflect the loss of National Steel as a customer. In approving the by-pass, the majority saw nothing wrong with Panhandle's position. In fact, the majority ruled that "[t]he instant case . . . is not a proper context in which to require a pipeline to reduce an LDC-customer's contract demand."[4] This was done even though the ALJ stated that "it is clear that a substantial portion of MichCon's contract demand can reasonably be related to its service to its large industrial customers

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[2] *See*, 40 FERC ¶ 61,220 at 61,750 (1987).

[3] *See*, 40 FERC ¶ 61,220 at 61,752 (1987).

[4] 40 FERC at p. 61,752.

and specifically to its service to National Steel."[5] The majority's position is thus one of holding that LDCs should not be procedurally protected from interstate by-pass competition but that interstate pipelines are procedurally protected from the logical secondary effect of their LDC by-pass proposals. In short, the pipeline, with the help of the FERC, imposes uneconomic costs on the LDC. Then, in the name of competition, provides lower prices to LDC customers than the LDC can provide. This form of strategic competition is not constructive and should not be approved by the FERC. It is a classic "price squeeze" antitrust offense.

This gross injustice and unwise encouragement of inefficient by-pass is not eliminated by the majority's observation that:

> "In Opinion No. 265-A, we determined that Panhandle's customers could renominate their entitlement under the D-2 billing component used to determine contract demand. We believe that this action significantly ameliorates any purported need for MichCon to reduce its contract demand in the context of the proceeding pending before us. (Footnotes omitted).[6]

This is nothing more than an observation that MichCon and its remaining customers would have been worse off still if a totally unrelated decision effecting all of Panhandle's customers had not be made. It is just as silly to argue, as the ALJ did, that the harm to MichCon's remaining customers is speculative because MichCon would not file for a rate increase solely because of the loss of National Steel's load.[7] Does anyone believe that MichCon will never file to reflect the changed circumstances on its system? I do not.

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[5] 38 FERC at p. 65,046.

[6] 40 FERC p. 61,753.

[7] 38 FERC p. 65,076.

The economic effect of the majority's decision, with respect to interstate pipeline by-pass proposals, is to encourage additional customers to flee LDC systems as per unit costs are driven up because of lost load and FERC-enforced contract demand payments even though the capacity is no longer needed because of the by-pass. Stated in another way, the majority's by-pass ruling places interstate pipelines in a no-lose situation and LDCs in a no-win situation. Clearly, this asymmetric distribution of benefits and losses cannot be claimed to be the logical outcome of constructive competition between interstate pipelines and LDCs.

To remedy this regulatory-induced distortion in price signals, I would have used section 5 of the Natural Gas Act to require Panhandle to grant MichCon the right to lower its contract demand by the same amount that the Commission certificated Panhandle to transport to National Steel.

On the issue of Panhandle's twelve section 7(c) applications, I find that they demonstrate the pattern of undue discrimination which caused me to dissent in *Texas Gas*.[8] Furthermore, as I have stated elsewhere,[9] I see no reason to approve transportation under section 7(c) which may have the effect of allowing an interstate pipeline, such as Panhandle, to unduly discriminate by segmenting its market, when nondiscriminatory transportation authority is now available to it.

I, therefore, dissent for the above stated reasons.

/s/ Charles G. Stalon
CHARLES G. STALON
Commissioner

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[8] *See*, dissenting statement of Commissioner Charles G. Stalon, Texas Gas Transmission Corporation, 35 FERC ¶ 61,231 (1986).

[9] *See*, e.g., dissenting statement of Commissioner Charles G. Stalon, Natural Gas Pipeline Company of America, 37 FERC ¶ 61,292 at 61,877 (1986).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Panhandle Eastern Pipe Line Company, Docket Nos. CP86-232-000, CP86-486-000, CP86-504-000, CP86-551-000, CP86-573-000, CP86-598-000, CP86-645-000, CP86-655-000, CP86-660-000, CP86-669-000, CP86-670-000 and CP86-671-000;

Independent Petroleum Association of Mountain States v. Panhandle Eastern Pipe Line Company, Docket No. CP86-584-000;

Independent Petroleum Association of Mountain States v. Colorado Interstate Gas Company, Docket No. CP86-663-000

INITIAL DECISION

(Issued January 22, 1987)

Daniel M. Head, Presiding Administrative Law Judge.

Appearances

Kevin M. Sweeney and *Jon L. Brunenkant* for Amoco Production Company

Thomas J. Eastment, Gordon Gooch, Mark S. Schroeder and *Jeffrey S. Levine* for Anadarko Petroleum Corporation

James H. Bailey for Arkla, Inc.

Richard A. Oliver for Carnation Company

John R. Schaefgen, Jr. and *Stephen L. Huntoon* for Central Illinois Light Company

Steven M. Sherman and *William P. Diener* for Citizens Gas & Coke Utility

Daniel F. Collins, William W. Bracket, Donald C. Shepler, G. Mark Cook and *William M. Lange* for Colorado Interstate Gas Company

John L. Shailer and *Thomas E. Morgan* for Columbia Gas of Ohio, Inc.

Frederick George and *Connie Davies* for Columbia Gas Transmission Corporation

John Brandolino and *Gary J. Klein* for Consolidated Fuel Supply, Inc.

William R. Hoatson and *Laura L. Murrell* for EnTrade Corporation

Phillip G. Lookadoo and *Michale Simmer* for Great River Gas Company

Gearold L. Knowles for Illinois Power Company

Ned Hengerer, Peter Esposito, Ken Wonstolen and *Pamela Prairie* for Independent Petroleum Association of Mountain States

Elizabeth R. Castle, William F. Demarest and *Thomas C. Jones, Jr.* for Kansas Industrial Energy Supply Company

Steven J. Kalish, William J. Harkaway and *Morgan J. Bregman* for Kansas Power & Light Company

Daniel L. Schiffer, James Holt, Jeffrey Petrash and *Kirk Howard Betts* for Michigan Consolidated Gas Company

Janet M. Robins, William Warfield Ross and *Daniel Korfsky* for Michigan Gas Storage Company

William H. Penniman and *Richard Zomnir* for National Steel Corporation

John H. Burnes, Jr., Peter L. Hatton and *James K. Morse* for Northern Indiana Public Service Company

Michael Cotleur for Ohio Consumers' Counsel

Raymond M. Shibley, Brian D. O'Neill, Patrick J. Whittle, Michael A. Kelly and *Lawrence Acker* for Panhandle Eastern Pipe Line Company

Joel Kaufman, Lynda Mounts and *Ronald Eastman* for the State of Michigan and Michigan Public Service Commission

Frederic G. Berner, Jr., Ernest B. Abbott and *Linda A. Madrio* for Tennessee Gas Pipeline Company, a Division of Tenneco, Inc.

John E. Moeller, Jr. and *David H. Coffman* for the Staff of the Federal Energy Regulatory Commission

Table of Contents

I. Procedural History

These consolidated proceedings involve twelve applications filed by Panhandle Eastern Pipe Line Company (Panhandle) for certificates of public convenience and necessity to provide transportation of natural gas to various parties under Section 7(c) of the Natural Gas Act (NGA), 15 U.S.C. § 717f(c), and two complaints filed by the Independent Petroleum Association of Mountain States (IPAMS) against Panhandle and Colorado Interstate Gas Company (CIG).

The twelve certificate cases which are described in detail in Section VI, *infra*, involve transportation services for the following parties in the below listed dockets: National Steel Corporation (National Steel) in CP86-232-000; Archer Daniels Midland Company in CP86-46-000; to amend certificate authority granted in docket numbers CP86-243-000, CP86-216-000, CP86-217-000, CP86-222-000, CP86-242-000, CP86-255-000 and CP86-256-000, to abandon service to Midwest Solvents Company previously authorized in Docket No. CP86-217-000 and to change service to R. R. Donnelly and Sons authorized in Docket No. CP86-223-000, all of which is now comprised in CP86-504-000; American Cyanimid Company in CP86-

551-000; 92 shippers in CP86-573-000; Kansas Industrial Energy Supply Company (KIESCO) in CP86-598-000; Amoco Production Company (Amoco) in CP86-645-000; Tennessee Gas Pipeline Company (jointly with Trunkline Gas Company) in CP86-655-000; Columbia Gas of Ohio in CP86-660-000; eight end-users in CP86-669-000; Cabot Corporation in CP86-670-000; and Carnation Company in CP86-671-000.

Initially, in its September 16, 1986 order setting this cause for hearing (Hearing Order), 36 FERC ¶ 61,282, the Commission consolidated six of the above identified dockets with the IPAMS complaint against Panhandle, which is Docket No. CP86-584-000, and the IPAMS complaint against CIG, which is Docket No. CP86-663-000. The remaining six certificate cases were consolidated with the first six and the two IPAMS complaints by order issued by the Commission on September 23, 1986, 36 FERC ¶ 61,334.

In its September 16, 1986 Hearing Order, 36 FERC at p. 61,701, the Commission set the following issues for consideration at hearing:

> 1. Whether Panhandle's transportation policies have been or currently are unduly discriminatory. Whether Panhandle's section 7(c) applications demonstrate a pattern of undue discrimination by favoring a particular group of shippers, by treating similarly situated shippers differently, by favoring fuel-switchable end-users or by denying shippers access to transportation in an unduly discriminatory manner.
>
> 2. Whether Michigan Consolidated's sale of gas to National (Docket No. CP86-232-000) would be bypassed by Panhandle's applications. Whether the certificate authority sought by Panhandle for this transaction is required by the public convenience and necessity. Appropriate considerations might include: the make-up of National's fuel requirements and the

suppliers of those requirements; the availability of alternative sources of supply and the likelihood of their implementation in the operation of National's plant; whether National's choice of suppliers is not just between Panhandle and Michigan Consoldiated, but between Panhandle and someone else.

3. Whether customers of Michigan Consolidated would bear increased costs as a result of Panhandle's proposals, the magnitude of any such costs and their effects on Michigan Consolidated and its customers. If there are increased costs, whether those costs would be borne by those customers in any event, since National cites several proposals which it claims are more attractive financially than purchasing gas from Michigan Consolidated.

4. Whether Panhandle (or Panhandle and CIG jointly) has engaged in any anticompetitive behavior that is unduly discriminatory under the Natural Gas Act. Whether Panhandle has used its marketing affiliate, Panhandle Trading, to monopolize spot market transactions on its system in a manner that is unduly discriminatory under the Natural Gas Act.

Also, in the Hearing Order the Commission required that the hearing be expedited and that the initial decision be issued within 90 days, *id.* In the subsequent September 23, 1986 order consolidating the other six certificate cases, the Commission extended the time for issuance of the initial decision to January 15, 1987, *Panhandle Eastern Pipe Line Company*, 36 FERC ¶ 61,369 (1986). On January 12, 1987, the Commission made the decision issuance date January 22, 1987 because of the magnitude of this proceeding and the extensive record that had been developed.

The consolidated proceedings did become somewhat less complicated by certain subsequent action. First, IPAMS and CIG resolved their differences and filed a settlement on October 16, 1986, which was certified to the Commis-

sion on November 18, 1986, and approved by the Commission on December 29, 1986 [37 FERC ¶ 61,303]. Moreover, the twelve Section 7(c) applications were originally for transportation on an interruptible basis for over 150 shippers and involved 148 end-users, one producer, three off-system LDCs, and one on-system LDC. However, in Docket No. CP86-504-000 the application was withdrawn by Panhandle for five of the 39 shippers and in Docket No. CP86-573-000, two of the original 92 requests have been withdrawn (Panhandle Ex. 1, pp. 13, 14). Further, Amoco and CIG apparently resolved their differences in Docket No. CP86-645-000, although a formal settlement offer was not filed, and KIESCO and Kansas Power and Light Company (KPL) settled their differences and withdrew their prefiled testimony in Docket No. CP86-598-000.

As the proceedings progressed through the administrative hearing process, several major issues emerged. One is the so-called "by-pass" issue raised by Michigan Consolidated Gas Company (MichCon) in connection with the application for transportation service to the Great Lakes Division of National Steel. This proposal would permit direct service by Panhandle to National Steel, thereby by-passing MichCon, the local distributing company (LDC). Another issue is raised by the Central Illinois Light Company (CILCO) and Michigan Gas Utilities Company (MGU) (hereinafter referred to only as CILCO since the parties took a joint position in this cause). CILCO contends that the transportation policy of Panhandle as reflected in the Section 7(c) applications is unduly discriminatory since Panhandle will not transport gas for system supply for its General Service (G rate) customers, such as CILCO, because of a misinterpretation by Panhandle of Section 1.9 of its tariff. A third issue comes from the IPAMS complaint against Panhandle, which involves the circumstances relating to the opening in April 1986 of Panhandle for interim interruptible transportation pursuant to Section 311 of the

Natural Gas Policy Act (NGPA), 15 U.S.C. § 3371. Consideration of this issue entails scrutiny of the activities of Panhandle's marketing affiliate, Panhandle Trading Company (PTC). And, a fourth issue involves evaluation of whether the 12 Section 7(c) applications demonstrate any pattern of undue discrimination. In this area, consideration can also be given to MichCon's contention that the applications taken as a whole constitute an unduly discriminatory transportation program.

To resolve these substantial and complicated disputes, prehearing conferences were held September 24, 1986, September 29, 1986, October 9, 1986 and October 10, 1986, and the evidentiary hearing lasted almost three weeks, commencing on November 24, 1986 and concluding on December 11, 1986. As a result, the transcript consists of 2,561 pages in 17 volumes. Further, at the evidentiary hearing, 222 exhibits totalling 2,613 pages were offered into evidence and 203 exhibits totalling 2,295 pages were received into evidence, with 19 exhibits totalling 318 pages being rejected. In addition, initial briefs were filed by CILCO, Citizens Gas & Coke Utility (Citizens), Columbia Gas of Ohio, Columbia Gas Transmission Corporation, EnTrade Corporation (EnTrade), the Illinois Commerce Commission, IPAMS, MichCon, Michigan Gas Storage Company, the State of Michigan and Michigan Public Service Commission, National Steel, the Ohio Office of Consumers Counsel, Panhandle, the Public Utilities Commission of Ohio and the Commission Enforcement Staff (Staff). Reply Briefs were filed by CILCO, Citizens, Columbia Gas of Ohio, EnTrade, IPAMS, MichCon, Michigan Gas Storage Company, National Steel and Panhandle.

Because of the complicated issues raised, the scope of the issues set for hearing, and the expedited nature of the case, the transcript and exhibit references supporting the rulings, analyses, findings and conclusions herein should generally be considered as representative rather than as

a comprehensive listing of all material supporting a particular point. Further, any arguments in the initial and reply briefs not specifically addressed are hereby rejected as not supported by the Presiding Judge's evaluation of the evidence, or as not being of sufficient persuasiveness to warrant comment. Furthermore, any proposed finding or conclusion submitted in a party's brief, which finding or conclusion is not incorporated directly or inferentially into this initial decision, is rejected as being unsupportable in law or fact, or as being unnecessary to the rendering of this initial decision.

Concerning format, this decision is structured first to describe the pertinent statutory and regulatory authority and then to deal with the issues presented: the by-pass issue; the Section 1.9 tariff issue; the interim Section 311 transportation issue; and the issue of whether the Section 7(c) applications as a whole are discriminatory. It will then provide findings and conclusions based upon the analyses of the issues and will set out any conditions considered warranted by resolution of the issues. Finally, an order will be entered promulgating the ultimate action required by the initial decision.

II. Pertinent Authority

The twelve transportation applications herein are filed pursuant to Section 7(c) of the Natural Gas Act (NGA), 15 U.S.C. § 717f(c), which provides in pertinent part:

> (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public

> convenience and necessity issued by the Commission authorizing such acts or operations . . .
>
> * * *
>
> In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly . . .

The public convenience and necessity standard for judging Section 7(c) applications and the power to condition such applications is contained in Section 7(e) of the NGA, 15 U.S.C. § 717f(e), which provides:

> (e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

The interim interruptible transportation program was initiated by Panhandle in April 1986 pursuant to Section 311 of the NGPA, 15 U.S.C. § 3371. The pertinent transportation provisions of Section 311 are as follows:

> SEC. 311. Authorization of Certain Sales and Transportation.
>
> (a) Commission Approval of Transportation.—
>
> (1) Interstate Pipelines.—
>
> (A) In General.—The Commission may, by rule or order, authorize any interstate pipeline to transport natural gas on behalf of—
>
> (i) any intrastate pipeline; and
>
> (ii) any local distribution company.
>
> (B) JUST AND REASONABLE RATES.—The rates and charges of any interstate pipeline with respect to any transportation authorized under subparagraph (A) shall be just and reasonable (within the meaning of the Natural Gas Act).

The interruptible Section 311 transportation program begun by Panhandle in April 1986 is described as interim since it was originally only intended to last until June 30, 1986. The Commission had provided for such interim transportation under Order No. 436, Deregulation of Natural Gas Pipelines after Partial Wellhead Decontrol, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,665 (1985) (hereinafter cited as Order No. 436 with the page number in the Regulations Preambles volume) by allowing a pipeline to provide blanket transportation under a waiver of the effectiveness of the contract demand reduction and conversion provisions of Order No. 436. This waiver has been extended several times, and is now effective for Panhandle until the earlier of May 1, 1987, or 10 days after the Commission issues an order on Panhandle's pending blanket certificate application in Docket No. CP86-585-

000. *Texas Eastern Transmission Corp.*, 37 FERC ¶ 61,217, at p. 61,552 (1986).

Order No. 436, had been promulgated pursuant to, *inter alia*, Sections 4, 5 and 7 of the NGA and Section 311 of the NGPA, Order No. 436 at p. 31,471, and many of its provisions relating to the current case are contained in Part 284 of the Commission's regulations, 18 C.F.R. Part 284. Of particular pertinence are Sections 284.8(b) and 284.9(b), which sections provide that any interstate or intrastate pipeline that offers firm or interruptible transportation service must provide such service without undue discrimination or preference of any kind. These nondiscrimination requirements were enacted in response to the Maryland Peoples' Counsel cases, *Maryland People's Counsel v. F.E.R.C.*, 761 F.2d 768 (D.C. Cir. 1985) (MPC-I); *Maryland People's Counsel v. F.E.R.C.*, 761 F.2d 780 (D.C. Cir. 1985) (MPC-II); and *Maryland People's Counsel v. F.E.R.C.*, 768 F.2d 450 (D.C. Cir. 1985) (MPC-III). Also relevant to the instant decision are the aforementioned Order No. 436 contract demand reduction rights (codified as Section 284.10(c)) and conversion rights (codified as Section 284.10(d)).

In addition, of importance to the Section 1.9 issue is the definition of "natural-gas company." In the NGA, 15 U.S.C. § 717a(6), a natural-gas company is defined as follows:

> (6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce or the sale in interstate commerce of such gas for resale.

This definition was affected by Section 601 of the NGPA, 15 U.S.C. § 3431, which reads in pertinent part:

> Sec. 601. Coordination with the Natural Gas Act
>
> (a) Jurisdiction of Commission under Natural Gas Act.
>
> (1) Sales.—

(A) Natural gas not committed or dedicated.—For purposes of section 1(b) of the Natural Gas Act, effective on the first day of the first month beginning after November 9, 1978, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to natural gas which was not committed or dedicated to interstate commerce as of November 8, 1978, solely by reason of any first sale of such natural gas.

(B) Committed or dedicated natural gas.—Effective beginning on the first day of the first month beginning after November 9, 1978, for purposes of section 1(b) of the Natural Gas Act, the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply solely by reason of any first sale of natural gas which is committed or dedicated to interstate commerce as of November 8, 1978, and which is—

(i) high-cost natural gas (as defined in section 3317(c)(1), (2), (3), (4) of this title);

(ii) new natural gas (as defined in section 3312(c) of this title); or

(iii) natural gas produced from any new, onshore production well (as defined in section 3313(c) of this title).

(C) Authorized sales or assignments.—For purposes of section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such act shall not apply by reason of any sale of natural gas—

(i) authorized under section 3362(a) or 3371(b) of this title; or

(ii) pursuant to any assigned [sic] authorized under section 3372(a) of this title.

(D) Natural-gas company.—For purposes of the Natural Gas Act, the term "natural-gas company" (as defined in section 2(6) of such Act) shall not include any person by reason of, or with respect to, any sale of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission do not apply to such sale solely by reason of subparagraph (A), (B), or (C) of this paragraph.

With the above statutory and regulatory framework in mind, the specific issues can be addressed and resolved.

III. The By-Pass Case

In Docket No. CP86-232-000, Panhandle requests authorization under Section 7(c) of the NGA to transport gas on behalf of National Steel, which has arranged for the purchase of gas in Oklahoma at facilities that are connected to the Panhandle system. National Steel wants Panhandle to transport the gas to National Steel's facility in Ecorse, Michigan, where Panhandle's pipeline runs through the property on which the National Steel plant is located. As a result, the Panhandle system can readily be interconnected directly with National Steel. National Steel is currently having its gas transported by MichCon, the local distributing company (LDC) that is a partial requirements customer of Panhandle. Therefore, were National Steel to be supplied directly by Panhandle through the interconnection proposed in the 7(c) application, this would result in a by-pass of MichCon's system and the loss of National Steel as a MichCon customer. National Steel further takes the position that it is currently pursuing alternate energy supply sources which it will continue to pursue whether or not the Panhandle 7(c) application is granted. National Steel states that it intends to terminate its dependence on MichCon and to have a variety of alternate energy sources available to it.

In support of its position, National Steel presented direct and reply testimony, as did Panhandle. MichCon,

on the other hand, submitted only a direct case in opposition to the Section 7(c) application to serve National Steel.

A. The Case for the By-pass

Panhandle's existing pipeline facilities cross the property of National Steel's Great Lakes Steel Division between the main plant and the hot strip mill (NS Ex. 1, p. 10; NS Ex. 2). To interconnect National Steel to Panhandle requires the construction of two taps costing a total of $188,000 (NS Ex. 1, p. 9; NS. Ex. 2). National Steel will reimburse Panhandle for the construction expenses of these two taps so that no costs related thereto will be borne by Panhandle or its existing sales or transportation customers (NS Ex. 1, p. 9; NS Ex. 3, p. 2). However, National Steel will require certain additional internal piping to distribute the gas on its plant property but this piping will be constructed by National Steel irrespective of whether the application herein is granted, since the piping is necessary to accommodate other alternatives that National Steel is pursuing. These facilities also will be paid for by National Steel. (NS Ex. 1, p. 10; NS Ex. 2; Tr. 1222-23, 1225-27.)

If National Steel achieves direct service from Panhandle National Steel estimates that it will be able to reduce its annual natural gas costs by up to $12,394,000 in 1987 and by up to $10.3 million per year thereafter (NS Ex. 1, p. 9). As a result, payback of the cost of the tap facilities will be achieved in the first five days of full operation of the connection with Panhandle (NS Ex. 3, p. 1). In addition, approval of the 7(c) certificate affords National Steel direct access to producers attached to Panhandle's system (NS Ex. 3, p. 2), and gives it greater flexibility of supply since Panhandle's only direct connection with MichCon, the River Rouge station, is fully utilized for delivery of transportation volumes for MichCon's supply system (NS Ex. 1, p. 37; NS Ex. 3, p. 2).

National Steel asserts that it is in a struggle to survive and to do so must reduce its overall costs, including energy costs, since it cannot control steel market prices (NS Ex. 1, pp. 11, 12). Because of the intense competition in the steel industry, National Steel has lost substantial amounts in the last few years: $161 million in 1983; $88 million in 1985; and $62 million in the first three quarters of 1986, although it did make $21 million in 1984 (NS Ex. 1, p. 12). National Steel has 5,500 employees at its Great Lakes Steel Division and approximately 12,000 company-wide (NS Ex. 1, p. 3). While National Steel currently ships 4,500,000 tons of steel products per year, it has dramatically cut back its operations in the last eight years to cope with intense market pressures in the steel industry and has reduced by half its Great Lakes plant's employment and blast furnace operations (NS Ex. 1, pp. 3-4). As a result, National Steel contends that it is essential for it to achieve all cost savings including, in this particular instance, energy cost savings so that it can maintain its level of employment and production that results in benefits to the local community where the plant is situated.

Moreover, National Steel presented evidence that it is actively pursuing several alternative methods of eliminating or reducing its reliance on MichCon. These include: (1) the construction of a pipeline running from the Great Lakes plant under the Detroit River to a Canadian supplier in Windsor, Ontario; (2) the conversion of some or all of its Great Lakes Steel Division to ethane; (3) barging Canadian gas across the Detroit River from Windsor, Ontario directly to National Steel's plant; and (4) using an existing, but idle, ethane line which runs from Canada to an Ohio S & G plant connected to the Columbia system (NS Ex. 1, pp. 18-27, 31-35, 38-39).

At present, National Steel is negotiating with Canadian suppliers and completing the engineering studies needed to construct the pipeline from its Great Lakes plant un-

der the Detroit River to a Canadian supplier (NS Ex. 1, pp. 31-34; Tr. 1267-90). Further, based on testing already conducted, National Steel has determined that ethane is a viable alternative to natural gas and a supplier, Dome Petroleum, had undertaken to obtain necessary delivery authority before that proposal became stalled because of litigation (NS Ex. 1, pp. 20-26). Regarding the barge alternative, it is temporarily stayed pending the outcome of this proceeding and National Steel's more intensive current pursuit of the under-the-river pipeline alternative, although National Steel states that the economics of barging gas are favorable in relation to MichCon's current transportation rates (NS Ex. 1, pp. 34-35; Tr. 1290-91, 1303-04). As a result, National Steel has indicated its intent to eliminate reliance on MichCon irrespective of whether the 7(c) certificate at issue herein is granted (NS Ex. 1, pp. 29-30; NS Ex. 3, p. 3).

Further, National Steel asserts that the Panhandle application would preserve a large load for the domestic interstate gas market and would provide Panhandle with a substantial incremental load of up to 13 Bcf per year (NS Ex. 3, p. 2). Also, National Steel contends that, because of capacity constraints on Panhandle's existing interconnection with MichCon, Panhandle cannot serve both MichCon's existing demands for transportation and National Steel's additional load (NS Ex. 1, p. 37; NS Ex. 3, p. 2). Therefore, installation of the direct connection to National Steel will give it access to both Panhandle and producers connected to Panhandle, without diminishing MichCon's continued ability to receive deliveries from Panhandle (NS Ex. 4, p. 16; NS Ex. 3, p. 2). Moreover, the additional load represented by National Steel will help Panhandle by adding significant revenues to offset load losses that Panhandle has experienced (see MC Ex. 6, p. 13). And, these additional revenues will benefit all of Panhandle's customers by lessening pressure on Panhandle to seek a future rate increase and eventually by

spreading Panhandle's fixed costs over greater throughput volumes after they are taken into account in the next Panhandle rate proceeding (NS Ex. 1, p. 41). As a result, National Steel avers that the granting of the 7(c) application will provide substantial benefits to Panhandle and to the public by saving a substantial load to be served by domestic production and by providing cost benefits to the other customers served by Panhandle's system.

National Steel also outlined certain difficulties that underlie its decision to seek alternatives to using MichCon as a gas supplier. For example, although National Steel had requested transportation services earlier, such requests were rejected for 2½ years by MichCon until March 1986, when MichCon began transporting gas for end-users, including National Steel (NS Ex. 1, pp. 16-17, 30, 37; Tr. 1632). Also, National Steel asserts that MichCon has subjected it to high sales and transportation rates which bear no relation to MichCon's cost-of-service (NS Ex. 1, pp. 15-16; NS Ex. 4, p. 18; NS Ex. 8). In this regard, prior to early 1986, MichCon offered transportation services at rates equal to \$2.40 per Mcf, which was nearly seven times its calculated cost-of-service of \$.36 per Mcf (NS Ex. 1, pp. 30, 35; NS Ex. 4, p. 18; NS Ex. 8). National Steel points out that MichCon's own study shows that its fully allocated cost-of-service for transportation on behalf of large volume end-users is \$.36 per Mcf, which is less than half the rate it currently charges National Steel (NS Ex. 4, p. 18; NS Ex. 8). In this regard, National Steel currently pays a monthly customer charge of \$50,000, plus \$.69 per Mcf for deliveries, producing an average charge of \$.75 per Mcf, which average charge will become \$.83 per Mcf on January 1, 1987 (NS Ex. 1, pp. 6-7). National Steel calculates that, based on MichCon's own cost-of-service study, it pays excessive transportation charges of at least \$6 million per year (NS Ex. 4, p. 18). Further, National Steel points out that MichCon's regular industrial sales

margins, upon which the transportation rates are based, reflect an index of return of 5.14, which means the large industrials' contribution to MichCon's rate-of-return is 5.14 times the system average (Tr. 1531-32). In relation to residential service, the large industrials' contribution to MichCon's return is 15 times the contribution of the residential customers, for whom the index of return is .35 (Tr. 1531-32).

At present, National Steel is transporting all of its supplies through MichCon. However, were it to purchase gas from MichCon, the current sales rate to National Steel is governed by a Special Steel Contract from which either party may withdraw as of May 1, 1987. The rate under the Special Steel Contract is $4.25 per Mcf and MichCon's delivery margin is $1.85 per Mcf under that contract, which also imposes penalties of $1.00 per MMBtu for alternate fuels used during the term of the contract (NS Ex. 1, pp. 8-9; Tr. 1521-22). National Steel submits that MichCon's approach to industrial rates reflects a policy of attempting to charge the industrial customer the maximum price which the customer would agree to, in order to obtain the maximum possible spread on each sale given the unique situation of each customer (NS Ex. 3, pp. 8-9; NS Ex. 9, p. 3; NS Ex. 11; Tr. 1515-18, 1523). National Steel asserts that it is uncontradicted that, for at least the last ten years, MichCon has burdened large industrial customers such as its Great Lakes Steel plant with excessive distribution charges which are not based on its cost of providing service (NS Ex. 4, pp. 19-20; NS Ex. 8), and this has resulted in a subsidization by the industrials of the residential and commercial customers. Moreover, the imposition of the large costs on industrial customers has contributed to industrial load losses on MichCon's system, which has increased the cost of gas for the remaining customers (NS Ex. 4, pp. 19-20). In addition, National Steel points out that MichCon's return on equity has been approximately 17 to 19 percent in the past three years (NS Ex. 4, pp. 8-9; NS Ex. 7).

On another front, National Steel contends that MichCon currently does not have any real competition for natural gas transportation or deliveries in its service territory (Tr. 1573). National Steel also points out that MichCon purchases from 80 to 90 Bcf per year, or approximately 45 percent of its system supply requirements, directly from local producers in Michigan (Tr. 1650, 1656). These local purchases resulted in a gas cost of approximately $3.56 per Mcf and are subject to high take-or-pay requirements, in the order of 90 to 100 percent (Tr. 1649-55). Therefore, National Steel asserts that gas-on-gas competition will give MichCon incentive to reduce its operating costs and rates, including its gas purchase costs, and will spur MichCon to offer new services and rates which will benefit all of its customers (NS Ex. 3, pp. 3-4; NS Ex. 4, p. 13; Tr. 1645-47). In this latter regard, National Steel argues that it is in the public interest for competition to exist at all levels of the gas industry (NS Ex. 1, pp. 14-15; Panhandle Ex. 30, pp. 13-14).

In addition, National Steel contests MichCon's claims that there will be cost shifting as a result of granting the Section 7(c) application. First, National Steel points out that MichCon will still have the opportunity to service National Steel's load if it offers services at reasonable prices (NS Ex. 1, p. 41; NS Ex. 4, pp. 6-7). Moreover, National Steel, even if it is taking its gas supply through Panhandle, might be interested in obtaining additional services, including standby services, storage services, balancing services, etc. from MichCon (NS Ex. 1, p. 41; NS Ex. 4, pp. 6-7). In this regard, National Steel notes that standby services alone could earn MichCon up to $2.2 million annually (NS Ex. 4, p. 7; NS Ex. 5).

National Steel further avers that no significant costs attributable to it remain to be shifted to anyone else. The facility investments linked to National Steel were constructed about 1960 under an initial 10-year contract signed at that time (MC Ex. 16, pp. 13-14; Tr. 1578).

Moreover, these facilities, except for a very minor amount, have been fully depreciated since MichCon depreciates its distribution facilities over 25 years and its transmission facilities over 20 years (NS Ex. 4, pp. 7 and 8; NS Ex. 6; Tr. 1525).

In addition, National Steel argues that it has not been established that there will be any cost shifting to MichCon's other customers. In this regard, National Steel notes that the question of who will bear any loss of revenues—whether it be MichCon's shareholders or its customers—will ultimately be decided by the Michigan Public Service Commission (MPSC) (NS Ex. 4, pp. 8, 9). National Steel contends that, if the choice on bearing such costs is between National Steel's shareholders who are struggling for long term survival and either MichCon's shareholders who are currently earning a 17 to 19 percent return on equity or MichCon's subsidized non-industrial customers, then the decision should be in favor of National Steel (NS Ex. 3, p. 3). Moreover, National Steel indicates that MichCon would not file for a rate increase just because of the loss of National Steel's load (Tr. 1534).

In addition, National Steel controverts the MichCon claim that other large industrials will be lost if the certificate in CP86-232-000 is granted. National Steel points out that this assumes first, that MichCon will not make any serious effort to compete for this business; second, that the industrials will seek and Panhandle will contract to provide direct services; and third, that Panhandle will be granted more Section 7(c) certificates to expand facilities (NS Ex. 4, pp. 12-13). National Steel also mentions that the Commission does not automatically approve Section 7(c) certificate requests and that the Commission must, upon the filing of a proper protest, conduct proceedings and specifically find that any further new hookups serve the public convenience and necessity. National Steel asserts that the unique factors warranting direct

service by Panhandle to it mean that this case does not constitute any precedent for other industrial customers to obtain direct service from Panhandle in the future.

B. The Case Against The By-pass

MichCon takes the position that the Commission has long maintained the policy that proposals that represent distributor by-pass are not in the public interest, citing *Panhandle Eastern Pipe Line Company v. F.E.R.C.*, 232 F.2d 467 (3rd Cir. 1956). MichCon points out that, in Order No. 436 at p. 31,569, *et seq.*, the Commission created a special set of procedures referred as the Optional Expedited Certificates (OEC) procedures, under which the historical presumption against distributor by-pass would not be applicable. MichCon argues that the Section 7(c) application filed by Panhandle to serve National Steel was not submitted pursuant to OEC procedures nor is Panhandle presently eligible under the criteria established in Order No. 436 to utilize those procedures. In this latter regard, to utilize the OEC procedures, Panhandle must have elected to make its transportation facilities available to all customers on a nondiscriminatory basis and allow its sales customers, such as MichCon, to reduce their contract demands, 18 C.F.R. §§ 157.102(c), 284.10. Accordingly, MichCon contends that the presumption that a by-pass of a local distributor does not serve the public convenience and necessity applies to the current proposal.

MichCon further asserts that the important thing to consider in connection with this application is that the standard under Section 7(c) is that the "public" convenience and necessity be served. Therefore, the argument is that a demonstration that the proposed service meets the private interests of Panhandle and National Steel, does not satisfy the requirements for the issuance of a certificate. MichCon argues that National Steel's focus is on certain immediate short-term savings in the cost of

natural gas and that it is incumbent upon the Commission to evaluate not only the immediate effects but the proposal's indirect and long-term effects as well, citing *Maryland People's Counsel v. F.E.R.C.*, 761 F.2d 768, 776-77 (D.C. Cir. 1985).

MichCon contends that National Steel's justification for the by-pass is actually based on National Steel's determination that the rates charged by MichCon for distribution services and transportation services are not economic. However, MichCon points out that, pursuant to Michigan law, it may not legally charge National Steel any rate for gas service that is not just and reasonable as determined by the MPSC. (MC Ex. 6, pp. 5, 6.) MichCon notes that transportation services by MichCon are a recent innovation so that the procedures for setting rates for those services are not as well established as for sales services. However, MichCon asserts that the comprehensive scheme of regulation under Michigan law requires that transportation rates be reasonably related to sales rates and points out that there are currently proceedings before the MPSC to examine MichCon's transportation rates (Tr. 1393).

MichCon then submits that many of the arguments raised by National Steel had previously been raised before the MPSC and rejected. Basically, MichCon argues that National Steel's support for the application consists of a complaint about the decisions and policies of the MPSC and that National Steel is seeking to use FERC as an appellate body to determine issues of state law, over which FERC has neither statutory jurisdiction nor regulatory responsibility. MichCon urges, therefore, that FERC disregard National Steel's protest about retail rates in performing its functions under Section 7(c) of the NGA. Further, MichCon points out that National Steel's complaints about bearing excessive costs cannot be reconciled with its own recognition that residential customers of MichCon presently pay over $5.00 per MMBtu

while National Steel pays approximately $2.63 per MMBtu (Tr. 1334).

Regarding the benefits and detriments relating to the by-pass, MichCon indicates that National Steel must incur indeterminate additional costs over and above the $188,000 for taps, which additional costs may be in the millions of dollars. For example, National Steel must expend $1.5 million for more piping at its plant and as much as $8 million in additional costs to utilize the various taps and interties that are contemplated (Tr. 1203-04, 1224-29). In addition, MichCon points out that the estimated savings in gas costs relied on by National Steel assume constant deliveries of gas by Panhandle for each day of the year, despite the fact that the transportation service that National Steel is to receive from Panhandle is interruptible (Tr. 1201-02). MichCon argues that nothing was presented by National Steel on the cost of an interruption of its gas supply or on the estimate of the value to National Steel of a firm backup service by MichCon (MC Ex. 1, p. 15). Therefore, MichCon argues that the supposed savings set out by National Steel are only hypothetical figures and cannot form the basis for a finding of what savings, if any, National Steel might achieve if the by-pass were approved.

Further, MichCon attacks National Steel on the grounds that National Steel could provide no meaningful basis for concluding that the savings that National Steel might achieve through by-pass would enhance National Steel's competitive posture or profitability. MichCon notes that National Steel could not say that the cost of gas is a principal competitive problem for it (Tr. 1233) and National Steel did not have knowledge as to the gas costs of other steel companies that had lost less money than National Steel (Tr. 1245). And, MichCon avers that National Steel could not say, even assuming the by-pass would allow it to save $5.00 per ton of steel at the prevailing market price of $350 to 500 per ton, as to how much

additional steel National Steel would be enabled to sell by this reduction (Tr. 1181). In this regard, MichCon points out that National Steel would not reduce its steel prices to reflect such savings in gas costs but would apply those savings to reduce its losses (Tr. 1181-82; see Tr. 1186-87). MichCon also notes that National Steel could not gauge the impact of the proposed savings on the profitability of the Great Lakes Steel Division and did not establish that the Great Lakes Division was currently profitable (Tr. 1186). As a result, MichCon argues that there is no evidence that permitting the by-pass would result in any meaningful savings to National Steel or in any enhance its commercial viability.

In addition, MichCon asserts that the public interest would not be served by the proposed by-pass. MichCon contends that the by-pass would not reduce the cost of serving National Steel's gas needs but would merely shift those costs to others; that the proposed bypass would not further the interests of competition in any way, but would allow Panhandle and National Steel to profit from unfair competition; and that the proposed bypass would permit National Steel to exploit fortuitous circumstances that have nothing to do with efficiency or competition, to the detriment of the overall gas consuming public.

As to the first point, cost shifting, MichCon takes the position that the Section 7(c) application would be undesirable because it would merely shift costs and would not enhance efficiency in the use of societal resources (MC Ex. 1, pp. 8-10). In this regard, MichCon contends that a mere comparison of the prices of alternate services to National Steel are not necessarily indicative of relative efficiencies (MC Ex. 1, p. 8). Considering that the cost of delivering gas to National Steel would be increased by construction costs that could run into the millions of dollars, MichCon takes a position that the real cost for providing gas service to National Steel will increase significantly, whereas the supplanting of the service provided

to National Steel by MichCon would result in no offsetting reduction in the cost-of-service (Tr. 1480-82; MC Ex. 1, p. 10). MichCon asserts that this increase in real costs, with no offsetting reduction in costs, is a central point in determining whether the proposed by-pass is in the public interest and that, in the broad picture, the expenditure of those costs would not be beneficial to society as a whole because it would not represent an optimal use of society's resources (Tr. 1474-76).

Further, MichCon contends that the loss of National Steel as a customer would result in a reduction of approximately $10 million in annual revenues to MichCon (MC Ex. 2, p. 3). The costs previously allocated to services to National Steel would have to be reallocated to MichCon's remaining customer base in a subsequent rate proceeding before the MPSC (MC Ex. 2, p. 3). Therefore, under MichCon's present retail rate structure, the loss of the National Steel load could have an immediate result of higher overall gas costs for MichCon's other customers (MC Ex. 2, pp. 3, 4).

MichCon further argues that the losses from granting this Section 7(c) application might be overshadowed by the long-term implications of permitting large industrial customers located near the main transmission line of an interstate pipeline to eliminate MichCon's services and concomitant revenues. In this regard, MichCon allegedly has numerous customers that are situated to make a FERC approved by-pass an attractive means of cutting their gas costs. If these other customers were successful in that regard, MichCon estimates that it could possibly lose annually revenues of $51 million in connection with by-pass for Detroit area industrial customers and revenues of approximately $64 million systemwide (MC Ex. 2, p. 4; MC Ex. 16, pp. 20-23). MichCon estimates, assuming the loss of the industrial customers in the Detroit area, that residential customers of MichCon would experience an increase of $29.00 in annual rates and, if

this situation were also to occur outside the Detroit area, MichCon's residential customers could experience a \$37.00 increase in annual gas costs. According to MichCon, under the same two assumptions, an industrial customer not favorably located near a pipeline could experience increased gas cost of \$10,000 and \$12,500, respectively. (MC Ex. 2, pp. 4, 5; MC Ex. 4; Mc Ex. 5.)

MichCon also attacks the Panhandle application as unduly discriminatory in that it offers an artificially low rate of approximately \$.40 per MMBtu for the proposed transportation service to National Steel. MichCon asserts that Panhandle has offered no support or cost justification for that rate. MichCon points out that, if Panhandle is permitted to commence service to National Steel, it would augment its annual revenues by approximately \$5 million (NS Ex. 1, p. 6), yet Panhandle would continue to collect from MichCon approximately \$31 million in fixed charges annually under Panhandle's sales rate schedule SS-1 (MC Ex. 6, p. 19). MichCon then avers that a substantial portion of these fixed charges to Panhandle are attributable to the historical requirement of MichCon for gas supply to serve its large industrial customers in the Detroit area, including National Steel. Therefore, MichCon argues that such a result would be anomalous, inequitable and unjustified. (MichCon Initial Brief, pp. 37-38.) MichCon points out that the rate for sales service payable by MichCon to Panhandle under rate schedule SS-1 is approximately \$.80 per Mcf, assuming MichCon utilizes its full entitlement. MichCon contends that it is economic for Panhandle to charge National Steel the lower proposed rate of \$.40 in large part because its fixed costs continue to be recovered through the demand charges and minimum bill payments by sales customers such as MichCon. This, MichCon contends, is inequitable. In this regard, MichCon asserts that this is an example of an anticompetitive practice that, in the context of electric utility ratemaking, is referred to as price squeeze, citing *F.P.C. v. Conway Corp.,* 426 U.S. 271

(1976). MichCon submits that the elements are present for price squeeze, that is, there are two providers of service competing in the same market and that the retail rates are higher than the proposed wholesale rates for comparable service.

MichCon also mounts an attack on the alternatives that National Steel indicates it will pursue. MichCon contends that the proposed alternatives suffer from deficiencies that render each of them either uneconomical, infeasible or speculative. MichCon argues that National Steel has no contract for the supply of Canadian Gas in connection with the under-the-river pipeline, or for the transportation of Canadian gas supply to the Detroit facility (Tr. 1271-74). Further, MichCon points out that there is no understanding in principle between National Steel and a Canadian supplier of terms to be reduced to a contract (Tr. 1275). Moreover, with respect to the underwater pipeline alternative, National Steel did not have any contract for the purchase of land necessary for the construction of that pipeline (Tr. 1361). Further, MichCon asserts that, while a contract was entered into by National Steel in January 1986 relating to the purchase of ethane, National Steel is not pursuing the ethane project (Tr. 1252) and the contract does not require National Steel to go forward to implement that contract. Concerning the river barge alternative, MichCon points out that National Steel has no contract with the barge transporter (Tr. 1290) and that no land has been purchased on the Canadian side of the river for barge operations (Tr. 1360-61). In addition, MichCon brought out that no regulatory approvals have been sought for any of the alternatives that involve the importation of natural gas from Canada (Tr. 1282).

Moreover, MichCon argues that none of the alternate proposals make economic sense because, through its providing transportation services, MichCon has enabled National Steel to purchase gas in the low cost, domestic spot

market. In this regard, MichCon notes that National Steel's present burner tip cost of gas through MichCon is approximately $2.63 per MMBtu, while the ethane supply would be available at a cost of $3.38 per MMBtu, which is not competitive (Tr. 1354). Also, MichCon assertes that retrofitting National Steel's plant to use ethane would require a shutdown of portions of the facility for 30 to 40 weeks, that it would cost National Steel $1 million to $3 million to convert its Zug Island operations to ethane and that it would require an additional $6.5 million to convert the remainder of its Detroit facilities (Tr. 1229, 1247). And, MichCon avers that the proposed barge alternative is uneconomic since the cost of transporting gas by barge across the Detroit River alone could amount to $.80 per Mcf (Tr. 1291). In addition, MichCon notes that this does not include the wellhead cost nor the cost for transportation of the gas from Alberta, Canada, which might be approximately $1.00 (Tr. 1278). Further, MichCon asserts that an under-the-river pipeline would generate costs of an additional $.05 ot $.12 per MMBtu (Tr. 1278). Also, as to the existing petroleum product pipeline that runs south from National Steel's facility, MichCon submits that the pipeline has historically been used to transport petroleum from north to south and that it is uncertain whether the pipeline has the capability to compress gas in a northerly flow as envisioned by National Steel (Tr. 1324-26).

Basically, MichCon argues that National Steel pursues a practice of playing its potential fuel suppliers off against one another to achieve a favorable negotiating posture by creating an impression that it is close to obtaining a cheaper energy supply from another source. Therefore, MichCon asserts that it should be recognized that National Steel's opinion in this proceeding is a further instance of that approach.

In addition to MichCon's opposition, the MPSC basically took the position that jurisdiction rests exclusively

with it to determine whether the present or future public convenience and necessity requires the construction of local facilities which will by-pass MichCon.

Also, Michigan Gas Storage Company (Storage Company) supported the MichCon argument that, since Panhandle does not qualify under the OEC procedures, Commission policy favors service through the local distributing company. Storage Company argues that, in employing this policy, the Commission's purpose is to prevent the shifting of costs from industrial customers to the residential and small commercial customers of the distributor, and cites *Southern Natural Gas Company*, 25 FPC 925, 926-27 (1961). However, Storage Company mentions that the Commission's decisions have recognized that the preference for service by a local distributor is conditional and would not apply if economic considerations precluded it, so that the circumstances of each case must be analyzed, *Panhandle Eastern Pipe Line Company*, 29 FERC ¶ 61,338 at 61,709-10 (1984).

Moreover, one point raised by Storage Company on the merits should be noted. In analyzing the difference in service obligations by pipelines and LDCs, Storage Company controverts National Steel's contention that difference in service obligations lose their meaning if the specific line between a distributor's system and an end-user's plant has largely been depreciated (NS Ex. 4, p. 7). Storage Company argues that a distributor's service obligations do not just lead to investment in local facilities for a particular customer. Rather, Storage Company contends that the whole distribution system must be created and maintained in a manner that takes into account those obligations (Tr. 1579, 1343-44).

C. Analysis and Resolution

At the outset, it is appropriate to deal with the claim made by Storage Company and MichCon that the application should not be granted because of the Commission

policy favoring service to industrial customers through LDCs rather than direct service from pipelines. These parties recognize that this policy has been altered where the OEC procedures under Order No. 436 have been used, and then correctly point out that the current Section 7(c) application by Panhandle was not filed pursuant to those OEC procedures. However, the Commission has recognized that the preference for service by the local distributor is conditional and does not apply if economic considerations preclude it, so that the circumstances of each case should be analyzed, *Panhandle Eastern Pipe Line Company*, 29 FERC ¶ 61,338, at pp. 61,709-10 (1984). It is clear that there has been a thorough evidentiary presentation made by National Steel and Panhandle, with a thorough contesting evidentiary presentation put on by MichCon. There is, therefore, a sufficient basis to determine whether economic considerations override any preference for service by the local distributing company, MichCon.

Moreover, it is instructive to look at the Commission's rationale in discussing the by-pass issue in connection with its promulgation of the OEC procedures. In Order No. 436 at pp. 31,570-72, the Commission noted that it is making no judgment on whether LDC by-pass is in the public interest and the Commission made it clear that its intent was to ensure that the LDCs are provided an opportunity to demonstrate any alleged adverse effects resulting from LDC by-pass. The Commission further stated that the fact that an LDC by-pass may result is not in and of itself dispositive of the public convenience and necessity issue under the NGA. In the present case, the Commission's concern about notice to the LDC and the opportunity for the LDC to present to the Commission the adverse effects of the alleged by-pass has been fully met.

Further, in a recent by-pass case involving many similar issues (state versus federal jurisdiction, cost shift-

ing, by-pass policy), the Commission granted the Section 7(c) application without even ordering a hearing, *American Distribution Company,* Docket No. CP86-263-000, Order Issuing Certificate, issued December 23, 1986 [37 FERC ¶ 61,282], slip op. at 10. There, the Commission stressed the importance of competition, noting:

> In a competitive market environment, the parties are at risk for their own decisions, and the need to provide competitive service is the factor that leads to improved service at lower cost for consumers. [*Id.*]

The Commission also addressed the by-pass policy and reaffirmed that the individual circumstances of each case must be examined before applying the policy:

> Alabama Gas Corporation states that the Commission's policy is to favor service to industrial customers by local distributors. Citing *Panhandle Eastern Pipe Line Co.,* 36 FPC 1107, 1109 (1966), *modified,* 37 FPC 314 (1967), *aff'd sub nom. Panhandle Eastern Pipe Line Co. v. F.P.C.,* 386 F.2d 607 (3d Cir. 1967), it contends that we should apply that policy here unless there are cogent reasons to depart from it.
>
> In the past, the Commission indicated that it favors service to industrial distribution customers by local distribution companies. However, it has also made clear that it would not "adhere with uncompromising rigidity" to that policy, *Missouri Edison Company,* 47 FPC 849 at 851 (1972), but that it would examine the individual circumstances of each case presented before applying the policy. *Id. Panhandle Eastern Pipe Line Co.,* 29 FERC ¶ 61,338, at p. 61,709 (1984). [*Id.* at 11.]

In line with *American Distribution Company, id.* and *Panhandle Eastern Pipe Line Company,* 29 FERC ¶ 61,338, at pp. 61,709-10 (1984), the circumstances of

this particular case must be analyzed to determine whether the by-pass of MichCon is in the public interest, whether it should be granted, and whether any conditions should be attached thereto.

Another argument that needs to be addressed is that raised by the State of Michigan and the MPSC (hereinafter MPSC) that the application in PC86-232-000 should be dismissed because the MPSC, not FERC, has exclusive jurisdiction to determine whether the public convenience and necessity requires the construction of local facilities entirely within the state of Michigan that would result in the by-pass of a local distributing company.

The line between permissible state regulation of sales of gas within a state and impermissible intrusion by that state into interstate commerce has been, as late as 1983, reviewed by the Supreme Court, which restated the "bright line" test in *Arkansas Electric Cooperative v. Arkansas PSC*, 461 U.S. 375, 378-79 (1983). In *Arkansas Electric*, the focus was on the regulation of sales occurring within the state and the cases discussed therein, which are relied upon by MPSC, consider the scope of permissible state authority relating to a direct sale by a pipeline and a retail sale by a distributor. *See Panhandle Eastern Pipe Line Company v. PSC of Indiana*, 332 U.S. 507 (1947) and *Panhandle Eastern Pipe Line Company v. Michigan PSC*, 341 U.S. 329 (1951). However, the transportation of gas owned by a customer after purchase in another state brings into play different considerations, *Sebring Utilities Commission v. F.E.R.C.*, 591 F.2d 1003, 1016-19 (5th Cir. 1979), cert. denied 444 U.S. 879 (1979), and this is the situation extant in the instant cause. There is not a choice between a direct sale by Panhandle in Michigan or a resale by MichCon in Michigan. Rather, the sale of gas to National Steel is taking place in Oklahoma and is a sale in which Panhandle was not involved. Panhandle's involvement is limited solely to transportation, a matter outside the

scope of state regulation. This the Supreme Court made clear in *Panhandle Eastern Pipe Line Company v. PSC of Indiana*, 332 U.S. at 516 where it stated:

> Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.

Further, the Commission discussed its authority over the transportation of gas in Order No. 436-A. Deregulation of Natural Gas Pipelines after Partial Wellhead Decontrol, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,675, at p. 31,707 (1985) (hereinafter cited as Order No. 436-A with the page number in the Regulations Preambles volume):

> It is well established that the Commission's authority over the transportation of gas in interstate commerce includes the authority to issue certificates for the transportation of gas and the construction and operation of facilities from which direct sales are made. The authority to set rates for direct sales lies exclusively with the states. *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *Panhandle Eastern Pipe Line Company v. FPC*, 232 F.2d 467 (1956).
>
> The Commission has frequently exercised its authority over transportation to authorize pipelines in interstate commerce to construct and operate the facilities necessary to make direct sales, including transactions involving issues of distributor by-pass. In some instances, the Commission denied requests for direct sales that would bypass a distributor; in others, it approved the proposal, depending on the circumstances of the case and the factors bearing on

> the public interest. *See, e.g., Panhandle Eastern Pipe Line Company*, Order Denying Request for Rehearing, 31 FERC ¶ 61,333 (1985). The final rule does nothing to change this, nor does it alter traditional jurisdictional relationships between state and federal governments or preempt the states' authority to regulate rates for the retail sale of gas.

Because what is present in this case is an application for the transportation in interstate commerce of gas already owned by National Steel to its plant in Michigan and for authority to construct taps to effectuate this transportation on National Steel's private property in Michigan, it is clear that FERC has jurisdiction to grant such authority and that the grant thereof will not interfere in any way with Michigan's authority to regulate rates for intrastate transportation and for the retail sale of gas. In addition, it need not be addressed in this decision whether there might be some concurrent jurisdiction by Michigan with regard to the actual construction of the taps to connect the gas supply directly to National Steel. If there is such regulatory authority, that is a matter that Panhandle and National Steel will have to deal with at the state level before the MPSC.

In any event, the Commission in its recent decision in *American Distribution Company, supra* at 8, 9, considered similar issues relating to state/federal jurisdiction and held the Section 7(c) transportation at issue subject to FERC jurisdiction even though the case involved a distributor by-pass. In doing so, the Commission reaffirmed its position, which is equally applicable to the instant case, that it has jurisdiction over the transportation of gas in interstate commerce.

1. The Economics of the Proposal

MichCon relies upon an argument that the construction costs of the facilities, that is the taps and the other facilities necessary to interconnect National Steel directly

to Panhandle, represents a real resource cost to society that is not offset by other real resource savings, making the proposal uneconomic because it represents an inefficient use of society's resources. MichCon contends that the total cost of gas service consists of three components: gas costs, transmission costs and distribution costs (MC Ex. 1, p. 11), none of which will be reduced by the granting of the proposed application. Rather, MichCon posits that there will be the additional cost of the facilities needed to interconnect National Steel to Panhandle and to handle the gas within the National Steel plant, which would be an inefficient use of resources since there are no offsetting cost reductions.

This argument by MichCon is, however, unpersuasive. National Steel points out that the avoidance of unnecessary fuel usage and gas losses by MichCon more than offset, every year, the construction costs of $188,000 for the taps. Also, direct service by Panhandle to National Steel will generate annual gas savings equal to approximately $256,000 per year based on MichCon's actual fuel usage and "lost and unaccounted for" experience. Further, MichCon acknowledged that avoidable variable costs are in the range of $.02 to $.05 per Mcf, which translate to approximately $250,000 to $625,000 per year of avoidable costs based on National Steel's annual load of 12.5 Bcf. (NS Ex. 4, pp. 15-16; Tr. 1446, 1526-27.) It can reasonably be concluded, therefore, that there are real cost savings related to the direct service by Panhandle to National Steel. On this basis alone, there would be a recoupment of the facilities construction costs, even if they are considered not to be merely the $188,000 for the taps but are considered to be at the outside limit of $10 million. Based on the entire evidence regarding the facilities construction, it is more reasonable to conclude that the construction costs would be substantially under the outside figure of $10,000,000. Therefore, the cost savings would offset the expenditures within a reasonable number

of years. In this latter regard, MichCon evidence showed that, at today's interest rates, a recoupment of investment within a 15 to 20 year timeframe is reasonable (Tr. 1479). And, in the present case, it is warranted to conclude that recoupment of the facilities costs would occur well before expiration of a 15 to 20 year period.

Further, it was established that the savings by National Steel for the first year of operation could be as high as $12 million and could run as much as $10.3 million in each succeeding year. Assuming that these savings are offset by the fact that National Steel will probably have to expend about $2.2 million per year to secure backup service from MichCon. National Steel would still totally recoup its facilities construction costs, even if they were at the outside figure of $10 million, by the second year of operation of the direct service by Panhandle to National Steel. And, should the savings be discounted somewhat more because the transportation is interruptible, it is still warranted to conclude that National Steel would recoup its investment in a few years, certainly well within the 15 to 20 year period noted above. In addition, the payback in savings in this case are better for National Steel than they were for Hayes-Albion in *Panhandle Eastern Pipe Line Company*, 31 FERC ¶ 61,333 (1985). In that case, the Commission approved a certificate for direct service by Panhandle to an end-user who had been an historic customer of an LDC and who continued to receive standby service from the distributor. The Commission cited the user's potential significant savings of $.36 to $.65 per Mcf or $150,000 to $260,000 per year—savings which are small compared to those for National Steel.

Moreover, the above described savings of significant amounts of money would be a valuable asset to National Steel, even if it does not result in lower steel prices but merely is used by National Steel to offset its losses. Na-

tional Steel is in a struggle to survive and to do so it is reasonable for it to take every measure that it can to reduce its costs. Since it is a significant employer, with 5,500 employees at its Great Lakes steel plant and approximately 12,000 company-wide, it is of value for National Steel to achieve any significant savings to avoid further cutbacks in its operations and to avoid further layoffs at its Great Lakes plant where it has already reduced its employment by half (NS Ex. 1, pp. 3-4). The Panhandle-National Steel transportation proposal will assist National Steel in maintaining its current employment level and production level by lessening of National Steel's cost and improving its financial viability. This correspondingly will be of benefit to the community where the National Steel plant is located. While it is impossible to quantify how much assistance this savings will be to National Steel, it is a factor that is appropriate to take into account in considering the economic consequences of the Section 7(c) application.

Also, while the loss of the National Steel load may result in some cost shifting to MichCon's residential and commercial customers, a concern with any by-pass, this is not definite and will be a matter for the MPSC to take into account. The MPSC might well conclude that MichCon's stockholders should bear the brunt of any cost shifting, perhaps by some reduction in the 17% to 19% return on equity that is currently being achieved. It may well be that there will not be any adverse rate impact on the residential and commercial customers, particularly when MichCon concedes that the loss of National Steel alone would not cause it to file for a rate increase.

Further, the specter raised by MichCon of other extensive (up to $64 million) industrial load loss is not impressive. The Commission in *American Distribution Company*, *supra* at 11, considered a similar argument and indicated that possible future actions are a matter of speculation, when it held:

> Whether or not ADC-Alabama contemplates future by-pass is also immaterial to our determination here. Whether or not such future plans exist is a matter of speculation. It would be premature to consider them at this time; they can be considered in future cases within our jurisdiction if and when such plans have developed into concrete proposals.

In addition, the evidence revealed that, for at least the last ten years, MichCon has charged large industrial customers distribution charges that are not based on the cost of providing service, which has resulted in a subsidization by industrials of other classes of customers to such an extent that the industrial's contribution to MichCon's return is 5.14 times the system average whereas the residential customers produce a rate of return of only about one third the company average (Tr. 1531-33). There is, therefore, an equitable reason that tends to justify any cost shifting that might occur.

On balance, it must be considered that the overall economic benefits of the proposed Section 7(c) transportation application are very favorable to granting of the application. Of prime importance is that the proposal represents a substantial savings to National Steel that will help it to remain a viable entity in the competitive steel market and assist in its aim of avoiding further reductions and unemployment at the Great Lakes plant and at National Steel's other facilities.

2. Other Considerations

In addition to the economics of the proposal, there are other factors that must be taken into account in making a determination on whether the Section 7(c) application should be granted. National Steel has been, for an extended period of time, pursuing various other alternatives that would eliminate its dependence on the MichCon system. While MichCon attempted to attack these alternatives as being not feasible, uneconomical or a nego-

tiating ploy by National Steel, it was clear from the evidence presented by National Steel that it was serious in its intention to eliminate or reduce its reliance on MichCon. As described above, the alternatives include the under-river pipeline from the Great Lakes plant to a Canadian supplier in Windsor, Ontario, conversion of some or all of the Great Lakes plant to ethane, barging Canadian gas across the Detroit River from Windsor directly to National Steel's plant, and use of an existing but idle pipeline which runs from Canada to an Ohio S&G plant connected to the Columbia system.

The most promising of these alternatives is the under-the-river pipeline. In connection therewith, National Steel is currently negotiating with Canadian suppliers and completing engineering studies. While all the details of this proposal have not been worked out and final contractual arrangements agreed to, it is nonetheless more than merely a proposal for use as a negotiating tool. National Steel has been seriously exploring this possibility since 1983, and it can be considered an alternative source of energy supply that National Steel will be capable of effectuating in the short term.

Moreover, while the ethane proposal is currently blocked by litigation, making it a less viable alternative, it nonetheless appears to be a serious proposition. National Steel has expended funds for extensive testing on the use of ethane and has gone past the theory stage into signing a contract with Dome Petroleum as a step in effectuating the proposal. Regarding the barge proposal, while it is temporarily stayed pending the outcome of this proceeding, it was brought out that the economics of barging gas are favorable relative to MichCon's transportation rates.

It is reasonable to conclude, therefore, that National Steel will continue and secure an alternative source of supply, at least by the use of the under-the-river pipeline, irrespective of whether the certificate herein is granted.

Moreover, the alternatives do not appear to be merely negotiating ploys by National Steel, who has displayed a real intention to secure alternate sources of supply by one or more of the alternatives it outlined. In view of this, MichCon is going to lose at least some, if not all, of National Steel's transportation load whether this Section 7(c) application is granted or not. This has the effect of substantially lessening, if it does not totally eliminate, the by-pass argument by MichCon. This is, therefore, another factor to be considered in determining whether the Section 7(c) application meets the public convenience and necessity. In this regard, it eliminates a substantial portion, if not all, of the alleged cost shifting that may result from the proposal since the cost shifting will take place whether or not the proposal is granted. On the overall record, it is warranted to conclude that National Steel's commitment to alternative energy sources is both serious and viable.

Further, other benefits that flow from granting the application must be considered. First, National Steel correctly points out that Panhandle's proposal will preserve a large load for the domestic interstate market since the proposal involves a supply of Oklahoma gas. Moreover, it provides National Steel with a more flexible source of supply by allowing it to avoid any constraints that might arise by having to have its gas transported through the MichCon distribution system.

In addition, the Section 7(c) certificate would provide Panhandle itself with a substantial incremental load. The additional throughput and revenues generated by the direct interconnection with National Steel will benefit Panhandle and its other customers, particularly in light of Panhandle's load losses. The revenues represented by the transportation services provided by Panhandle to National Steel can reasonably be expected to inure to the benefit of Panhandle's other customers at the filing of Panhandle's next rate case.

MichCon also attacks the Section 7(c) application on the basis that the rate to be charged, the PT rate of \$.42, is discriminatory since the rate being charged to it under SS-1 rate schedule is almost double the PT rate, for essentially the same services. This argument, however, is not well taken. As explained on the record, the service to MichCon and to National Steel are very different. Regarding National Steel, you have an interruptible transportation arrangement, whereas with Mich Con you have a firm sales commitment. Therefore, the rates that are applicable to each company reflect the cost responsibility on Panhandle's system for the various types of service. It is basically reflective of the difference between firm and interruptible service, and the difference between sales and transportation service (Tr. 1642-43).

Further, it was brought out there are two other major differences in the rates. One is an approximately 26¢ gathering cost which is included in the overall sales rate but is not included in the interruptible transportation rate. The other is that demand costs paid by Panhandle to pipeline suppliers related to gas supply are included in the overall sales rate but again would not be included in the interruptible transportation rate. (Tr. 2294-95.) There is, therefore, a reasonable explanation for the difference in the rates to be charged National Steel for its interruptible transportation service and MichCon for its sales service under its SS-1 rate schedule.

Similarly, MichCon's argument is unpersuasive that there is discrimination resulting from the rate being charged by Panhandle for the interruptible service. In this regard, MichCon argues that Panhandle has an unfair competitive advantage in competing for National Steel's business since the disparity in rates creates an anticompetitive price squeeze situation, which is proscribed under *F.P.C. v. Conway Corp., supra.* The facts, however, do not fit the anticompetitive allegations. In the first place, two sales rates are not involved. Rather Mich

Con's sales rate is being compared with the transportation rate for interruptible service to National Steel. Moreover, Panhandle will charge its filed PT rates to all transportation customers without discrimination (Tr. 1666-67) and the Commission currently has under review the rate levels and rate designs relating to the PT rate in Docket No. RP86-116-000, so there is assurance that the PT rate will be just and reasonable.

In addition, since there are, as pointed out above, valid differences in the services and related costs that justify the difference in the PT rate and the SS-1 rate, no undue discrimination flows from the use by Panhandle of the PT rate. Indeed, if MichCon should secure transportation services from Panhandle, it would be charged the PT rate, since there is no distinction between the transportation rates charged to retail and wholesale customers. Therefore, MichCon's arguments relating to price squeeze and unfair competition by Panhandle based on its rates must be rejected.

Moreover, MichCon has attacked the use of the PT rates since they have not been substantiated by cost analysis in this docket. However, as noted above, the filed PT rates will be charged by Panhandle for all transportation customers and the Commission currently has under review the rate levels and rate design relating to the PT rates in Docket No. RP86-116-000. Since the outcome of that proceeding will ensure that the PT rates are just, reasonable and nondiscriminatory, it is unnecessary and wasteful in this case to duplicate the consideration in that docket.

Further, the MichCon arguments that conditions should be entered providing for either minimum bill crediting or contract demand reduction are misplaced. Regarding minimum bill crediting, it should be noted that Judge Liebman in his initial decision on Panhandle's last rate case eliminated the minimum commodity bill, *Panhandle Eastern Pipe Line Company*, 32 FERC ¶ 63,085, at p.

65,311 (1985). Moreover, in light of the Commission's recent decision in *ANR Pipeline Company*, 37 FERC ¶ 61,263 (1986), slip op. at 31, it seems that the Commission's current rationale is to sustain elimination of minimum bills. Since the latest Panhandle rate decision eliminates minimum bills and since the Commission policy is running favorably toward that action, there appears to be no need for the issuance of any minimum bill crediting because MichCon in the future will not be subject to minimum bill charges by Panhandle. Further, Panhandle does not provide any minimum bill credit to sales customers because the restatement of its base tariff rates in Docket No. RP85-194-000 reduces the cost of service by a representative level of transportation revenues, thereby providing all Panhandle's customers with a system-wide benefit for any transportation revenues.

As to the position taken by MichCon that any certificate issued should be conditioned on a cancellation or reduction of MichCon's contract demand (with a concomitant reduction of MichCon's fixed cost obligation) equivalent to the maximum level of the interruptible service proposed to be provided to National Steel (MC Ex. 6, pp. 22-23), it can first be pointed out that the contract demand reduction provision of Order No. 436 is a condition that a pipeline must accept in order to avail itself of the benefits of the self-implementing transportation program. However, the Commission has not required that the contract demand reduction condition be attached to regular Section 7(c) certificates. See, for example, *Southern Natural Gas Company*, 36 FERC ¶ 61,275, at pp. 61,677-78 (1986), where such a proposal was brought up but was not adopted by the Commission. Moreover, if approval of the application for a blanket certificate transportation authority under Order No. 436 is granted to Panhandle in Docket No. CP86-585-000, which is currently under review by the Commission, MichCon, like Panhandle's other customers, will have an opportunity to reduce its contract demand or to convert a portion of its contract de-

mand to transportation services. Therefore, it would not be equitable to provide MichCon with an option herein that is not available to other customers.

Overall, an evaluation of the other factors that are pertinent to determining the public convenience and necessity in connection with Panhandle's Section 7(c) application for interruptible transportation service to National Steel indicates that the application should be granted.

3. Conclusion

As discussed earlier, there are substantial benefits to National Steel, Panhandle and to the public generally from the proposal. National Steel's viability will be maintained and the communities where its plants are located enhanced thereby, Panhandle's other customers will benefit, and a substantial industrial load will be retained for domestic production. These benefits substantially outweigh the uncertain cost shifting effects of the proposal. Therefore, it must be concluded that granting the Section 7(c) application for interruptible transportation service by Panhandle for National Steel will serve the public convenience and necessity. Accordingly, the application for such service will be granted, except as modified below in Section VI, *infra*.

4. Policy Considerations

While MichCon did not prevail in its opposition to this particular certificate, it is appropriate to note that MichCon has raised some areas of genuine concern. To set this in perspective, it should be pointed out that MichCon is losing its largest industrial customer, National Steel. Despite the arguments about whose fault it is that this situation has occurred, it is clear that a substantial portion of MichCon's contract demand can reasonably be related to its service to its large industrial customers and specifically to its service to National Steel.

While MichCon is no longer receiving sales revenues, it is still receiving transportation revenues from serving National Steel and there is an attractiveness to its request for relief in its fixed-cost responsibilities to Panhandle, particularly in light of the evolutionary nature of the gas industry where many pipelines are rapidly going from merchant to transporter status. It may well be that this relief will only come if an Order No. 436 blanket certificate is granted and accepted by Panhandle, at which time MichCon's complaints may become moot.

Also, Order No. 436 and Order No. 436-A indicate that the Commission is attempting to promote viable competition in the gas industry, both at the producing level and at the burner tip. Therefore, granting of the instant application for service by Panhandle to National Steel comports with this competition fostering policy. However, MichCon makes a valid point that it is disadvantaged in attempting to compete for transportation customers since it has to add its transportation markup onto any transportation charges MichCon has to pay Panhandle. While an exact *Conway* unfair competition situation is not presented and while MichCon might be spurred to find other methods to compete successfully for National Steel's business, its efforts are limited by the fact that its sales rates and its transportation rates are scrutinized and controlled by the MPSC. In this regard, MichCon does have a more rigid regulatory structure than an interstate pipeline which, although it has statutory obligations relating to certification of service and abandonment of service, does not have the mandatory overall service obligations of a local distributing company such as MichCon.

Despite the general validity of regulatory actions being taken to foster competition (such as permitting Panhandle to compete with MichCon), there are some inherent dangers that might give certain entities an unfair and inequitable ability to take advantage of the situ-

ation. Although in the instant case National Steel presented valid and compelling reasons for eliminating its service by MichCon and securing Panhandle's transportation services, National Steel did display a rather predatory approach in its total espousal of competition. It was clear that National Steel's main rationale relating to competition was that it would seek to secure as many available sources of supply as possible and, by pitting one source against another, secure as low a rate as it could get for its energy costs. Indeed, National Steel was not concerned about paying a cost-based rate for MichCon's services but would seek to work the competitive forces even to obtain a below cost rate (Tr. 1347-49).

If, however, the gas situation reverses itself (as well might be the case should the world energy situation return to the not-to-far distant era of high cost oil prices, making gas attractive and putting it in short supply again), then it is likely that National Steel would reapply and again secure service from MichCon. This service, though, would be based on the cost of providing service to National Steel, since MichCon's rates would be cost-based and regulated by the MPSC. This scenario might well give National Steel an unfair position relative to MichCon. National Steel can drive the price down and secure under-cost energy through competition when gas is in oversupply but need only pay cost based rates when gas is in short supply.

Of course, were the industry totally unregulated, MichCon would be able to charge whatever price it could reasonably get from National Steel when gas is in short supply, presumably only limited by what price would cause National Steel to close its operations as uneconomic. If National Steel's competitive rationale is valid, this non-cost based pricing by MichCon to National Steel would be acceptable when gas is in short supply. It should be made clear, therefore, that the current case is being decided specifically on the public convenience and neces-

sity considerations discussed in detail above, and is not founded on any policy consideration espousing the total competition arguments relied on by National Steel, which are more appropriate for an entirely unregulated market. While it is recognized in Order No. 436 and Order No. 436-A that competition in the gas industry is desirable for the purpose of lowering gas costs to the consuming public, it must also be kept in mind that in many significant aspects (transportation at the interstate level; and retail sales at the state level) the gas business remains a regulated industry affected by far-reaching public interest considerations. The Commission recognized this retention of regulation in Order No. 436 at p. 31,470, and careful consideration must be given, in resolving issues relating to competition, to this dichotomy of regulation and nonregulation under which the natural gas industry is currently operating.

IV. The Section 1.9 Tariff Issue

A. *The CILCO Position*

During this proceeding, CILCO has been the leader of the attack on Panhandle's interpretation of Section 1.9 of its tariff to exclude the transportation for its full requirements (G rate) customers, if the gas transported is to be used for system supply. Other parties, primarily IPAMS, MichCon and the Commission Staff, have supported CILCO, but the attack on Section 1.9 is most thoroughly articulated by CILCO. Before describing the particulars of CILCO's position, it should also be pointed out that the identical argument applies to Section 1.8 of Panhandle's tariff, which covers the SG class of full requirements customers, who are customers having a contract demand of less than 10,000 Mcf during every month of the year. The pertinent language in Section 1.8 for SG rate customers is identical to the language in Section 1.9. While the decision will, for the purposes of simplicity, only address the Section 1.9 issue, its determina-

tions must be considered equally applicable to Section 1.8 of the tariff. Both Section 1.8 and 1.9 are in the record as part of CILCO Ex. 37. It also is warranted to mention that the description of the G rate customers as full requirements customers is not quite accurate. Certain G rate customers have intrastate supplies which do not raise a Section 1.9 tariff issue since the intrastate suppliers are not natural-gas companies as defined in the NGA.

Before turning to the arguments, it is in order to define the issue. To do so, it is helpful to set out the language of Section 1.9:

> 1.9 General Service Buyer. General Service Buyer is any buyer which does not purchase gas from any other natural-gas company, as defined in the Natural Gas Act, for distribution in areas served with Seller's gas provided, however, a Buyer under the General Service Rate Schedule which seeks from Seller an increase in contract demand and seller is unable to supply the increase in contract demand, then such Buyer may purchase natural gas from other natural-gas companies but shall remain a General Service Buyer under this tariff.

Buyers under Section 1.9 are described as G rate or G class customers of Panhandle and are considered as full requirements customers as opposed to partial requirements customers who are served under other Panhandle rate schedules and who have other interstate gas suppliers who sell gas to them for their system supply.

Panhandle has interpreted Section 1.9 to preclude a G rate customer, such as CILCO from buying gas for system supply from out-of-state producers and/or marketers and then having it transported by Panhandle for resale on the distribution system of the G rate customer. Under Panhandle's interpretation this would violate the tariff because the G rate customer would be purchasing

gas from another natural-gas company for distribution in areas served with Panhandle's gas.

CILCO's argument against this interpretation is concisely set out in the CILCO Initial Brief, pp. 9-11, and can be described as follows. CILCO alleges that Panhandle's past and present transportation policies demonstrate undue discrimination against Panhandle's allegedly captive sales customers such as CILCO. CILCO asserts that Panhandle has sought to segment its market by refusing to transport for CILCO and other similarly situated customers, and by seeking incremental revenues from transportation to markets where its sales rates are noncompetitive. CILCO avers that Panhandle's main concern is that any new transportation service not displace sales to its captive sales markets. Consequently, CILCO takes the position that Panhandle has made transportation available only to those off-system and on-system customers who have access to Panhandle's competitors or have fuel switching capability. CILCO submits that this is discrimination which violates Section 311 of the NGPA, under which Panhandle has been transporting for certain select customers since April of 1986, and that this also fails to meet the requisite public convenience and necessity standard for certification of Panhandle's Section 7(c) applications at issue herein.

CILCO also asserts that Panhandle's alternative, which is for the G rate customers to become partial requirements customers under its LS rate schedule, is prohibitively expensive and economically untenable. CILCO submits that Panhandle is using Section 1.9 to evade the nondiscriminatory requirements of Orders No. 436 and 436-A and of the Maryland People's Counsel cases, *Maryland People's Counsel v. F.E.R.C.*, 761 F.2d 768 (D.C. Cir. 1985) (MPC-I); *Maryland People's Counsel v. F.E.R.C.*, 761 F.2d 780 (D.C. Cir. 1985) (MPC-II); *Maryland People's Counsel v. F.E.R.C.*, 768 F.2d 450 (D.C. Cir. 1985) (MPC-III).

CILCO contends that Panhandle's interpretation of the legal effect of Section 1.9 is incorrect. CILCO points out that Section 1.9 does not, by its terms, prohibit G rate customers from receiving transportation for system supply without becoming LS customers. Further, CILCO argues that standard rules of contract construction confirm that, in light of the passage of the NGPA, the words "natural-gas company, as defined in the Natural Gas Act" should be interpreted to permit CILCO, MGU and other G rate customers to purchase from sources other than Panhandle and have Panhandle transport the gas.

Because of these allegedly discriminatory practices, CILCO asks that any certificates issued in this proceeding be conditioned to require Panhandle to transport gas for the system supply of G rate customers. CILCO further urges that Section 1.9 at least be interpreted to allow G rate customers to purchase natural gas supplies that have been certificate deregulated by Section 601 of the NGPA, 15 U.S.C. § 3431, and with respect to which producers or resellers are not "natural-gas companies, as defined in the Natural Gas Act."

B. *The Panhandle Position*

As noted above, Panhandle espouses the interpretation that to transport gas for system supply for G rate customers under its transportation authority, whether it be under Section 311 of the NGA or through a Section 7(c) application, would constitute a violation of Section 1.9 of its tariff since the G rate customer would be purchasing gas from another "natural-gas company, as defined in the Natural Gas Act" for distribution in an area served by Panhandle's gas. Panhandle, however, claims that it will not refuse to transport gas for system supply for a G rate customer but, if it does so, then the G rate customer must give up that customer class status and become a partial requirements customer under the LS rate schedule. Panhandle takes the position that CILCO

wants to retain the benefits of the full requirements rate class without assuming the responsibilities of that rate status. (*See* Panhandle Initial Brief, pp. 82-83.)

Panhandle's primary reliance in opposition to CILCO is that its interpretation of Section 1.9 has been upheld in its recent rate case before Judge Liebman, *Panhandle Eastern Pipe Line Company,* 32 FERC ¶ 63,085 (1985). Panhandle is supported in this by Storage Company, who suggests in its brief that the holding in this latest rate case undermines the argument that Panhandle is using Section 1.9 to discriminate unfairly against G rate customers (Storage Company Initial Brief, p. 16). Panhandle takes the position that the same arguments were raised by CILCO in attempting to change Section 1.9 before Judge Liebman, whose decision ruled against CILCO in all material respects concerning the Section 1.9 controversy. Moreover, Panhandle avers that, in the proceedings before Judge Liebman, there was a comprehensive evaluation of not only the aspects raised by CILCO here but of the overall rate design, cost classification, cost allocation and general tariff matters which are directly linked to the benefits and responsibilities of the various customer classes. Further, Panhandle contends that there is nothing in this record that would require any different conclusion than that reached by Judge Liebman (Panhandle Initial Brief, p. 84; Panhandle Ex. 30, p. 2).

Moreover, Panhandle does not contest that the Maryland Peoples' Counsel cases and the portions of Orders No. 436 and 436-A relied upon by CILCO do prohibit pipelines from discriminating by denying transportation to LDC customers. However, Panhandle asserts that CILCO has mischaracterized Panhandle's activities and incorrectly has applied the dictates of Order Nos. 436 and 436-A. In this regard, Panhandle denies the CILCO assertion that it is refusing transportation to its LDC customers for system supply. Panhandle points out that the current proceeding involves requests by Panhandle to

transport for various LDC customers and states that the record shows that LDC customers of Panhandle are receiving transportation of interstate gas for system supply where those customers are LS customers, whose cost responsibilities and obligations to the Panhandle system do not require Panhandle to have available capacity and natural gas supplies to serve their full requirements. Panhandle argues that CILCO is not precluded from receiving this same service, if it chooses to do so, by becoming an LS customer.

In addition, Panhandle controverts the CILCO claim that it cannot switch from the G to the LS tariff because it is prohibitively uneconomical to do so.

C. *Analysis and Resolution*

Although there was considerable rhetoric at the evidentiary hearing regarding whether Panhandle had "refused" to transport gas for system supply for G class customers, the underlying positions of the parties as set out above present more of a semantic than a factual dispute. Basically, CILCO states that Panhandle "refuses" to transport gas for system supply for G rate customers whereas Panhandle states that it does not "refuse" to transport gas for system supply for G customers, but that, if it does so transport, the customer will no longer qualify as a G rate customer but must become an LS rate customer. The main factual controversy that needs resolution is whether it would be prohibitively uneconomical for a G rate customer such as CILCO to change to the LS rate. We will address the economic question first before turning to the propriety of Panhandle's interpretation of Section 1.9.

Regarding the economics of using the LS rate schedule, CILCO's evidence sought to establish that a change of rate class would be economically justified only if the cost of gas from other sources, including the cost of Panhandle's transportation, was more than $1.09 below Pan-

handle's commodity rate. CILCO concludes that to require a differential of this magnitude is tantamount to imposing an absolute prohibition on the purchase of gas from non-Panhandle sources. (CILCO Ex. 24, p. 10; Tr. 933.) However, at hearing Panhandle effectively countered this argument. It was brought out that the current spot market price of gas is more than $1.09 per decatherm lower than Panhandle's commodity rate (Tr. 934). In addition, it was established that purchasing larger volumes than originally proposed by CILCO would mean that the required difference in price could be much less and might be as little at 11¢ (Tr. 936-38). In view of this, it is reasonable to conclude that under the current market conditions, there is no substantial economic barrier preventing CILCO or other G rate customers from switching to the LS rate to secure gas for system supply, if they should elect to do so.

Next, the reasonableness of the tariff section interpretation by Panhandle can be considered. First, it should be pointed out that the Section 1.9 tariff provision has been in effect for a substantial number of years, going back into the 1950s (Tr. 807). It was not, therefore, inserted into the tariff in this recent era of gas oversupply, which resulted in the increasing changeover from sales service to transportation service, as a device to retain sales customers.

Further, it is clear that Panhandle has been consistent in its interpretation of Section 1.9. This can be seen from Panhandle's response to the CILCO request for transportation for system supply in February 1983 (CILCO Ex. 3, pp. 2-3), its response to the Ohio Gas Company's transportation request for system supply gas (CILCO Ex. 26, p. 2), and in Panhandle's confirming in hearing that it is its long-standing policy not to offer any transportation service for the system supply of its G rate customers (Tr. 716, 720, 738, 2185).

To determine whether this is an appropriate transportation policy, it is necessary to delve into the rationale employed by Panhandle to justify this interpretation. To do this, a helpful place to begin is to consider the findings and rulings made in Panhandle's last rate case where the Section 1.9 tariff interpretation was thoroughly considered. The only distintion from the present case is that in the rate case CILCO sought to change the provisions of the tariff to permit the G rate customers to secure alternate sales service for system supply. The issues in the two proceedings are identical, the only difference being that here CILCO does not attempt to change the tariff provisions but merely seeks to have Panhandle's interpretation struck down, so the G rate customers can transport gas for system supply. The present case is, therefore, merely a different approach to the same problem that was addressed in the prior rate case.

Accordingly, we can turn to Judge Liebman's rulings in *Panhandle Eastern Pipe Line Company*, 32 FERC at pp. 65,321-65,326, to assess the propriety of Panhandle's interpretation of Section 1.9. Judge Liebman's consideration appears to have been thorough and his underlying rationale is valid. It is, therefore, warranted to set out in pertinent part his reasoning and rulings. First, it was held that Section 1.9 of Panhandle's tariff, when considered with other provisions in Panhandle's tariff, is just and reasonable, and not unduly discriminatory, *id.* at p. 65,323. The decision then discussed the differences between the G and LS rate schedules:

> There are differences between the G and LS rate schedules. The G rate schedule allows each customer to reduce its rights to take gas in the non-winter months, and correspondingly to reduce the demand charges it pays in non-winter months in recognition of the customer's reduced contract demand rights to take gas. The G rate schedule also includes a 90

> percent demand charge ratchet permitting reduced demand charges in months where purchases are below the maximum contract level. In contrast to the G Schedule, the LS rate schedule requires each customer to reserve, and pay demand charges on, the same contract demand in each month of the year.
>
> Another difference is that the existing LS rate schedule requires LS customers to pay a minimum commodity bill (although that feature is being eliminated by this initial decision); the G rate schedule contains no minimum commodity bill . . . With the elimination of the minimum bill, the LS rate schedule will be even more favorable to partial requirements customers than it now is. [*Id.* at pp. 65,323-24.]

Next, the rationale underlying the reasonableness of Section 1.9 was given:

> If Panhandle under the G rate schedule is going to have the obligation of serving the full requirements of a G customer, I do not find it unreasonable to require that customer to have a correlative duty to purchase its entire requirements from Panhandle under the G schedule. If Panhandle has purchased gas from its suppliers to serve a G customer's full requirements, it should not suddenly find itself in a position of having to dispose of this gas (or pay for it if it cannot sell it) when its G customer swings off the system. That event may increase Panhandle's take-or-pay obligations and increase costs to other customers of Panhandle. It would also put Panhandle in the position of having to retain that supply for the G customer's use if the G customer then swung back on Panhandle's system. The proposal of CILCO to let G customers swing on Panhandle's system while still remaining a G customer appears to be grossly unfair to Panhandle and its other customers.

In addition, it does not seem unfair to have a G customer take its full requirements from Panhandle under the G schedule when one considers the advantages which the G schedule gives to the G customer, such as the ability of the G customer to reduce the demand charges it pays to Panhandle during the non-winter months and the ability of the G customer to avoid having to develop storage. [*Id.* at p. 65,324.]

In addition, there was a salient discussion of CILCO's reluctance to move to the LS rate schedule, which is also applicable to the current case:

> The fact that CILCO does not wish to move to the LS schedule does not make that schedule unfair nor persuade me to allow CILCO to remain on the G schedule and swing. The problem with CILCO's position is that over the past three decades it has designed its system to take advantage of the G schedule and has not fully developed the natural storage capacity in its service territory. That was a decision which CILCO certainly had a right to make. CILCO cannot turn around and effectively argue that because it has taken advantage of the G schedule and not fully developed its storage, the LS Rate Schedule should not be applied to it if it becomes a partial requirements customer of Panhandle. The record shows that CILCO has the capability, with increased construction, to supply almost 70 percent of its maximum daily send out from its own storage fields (Tr. 4110-11 and Ex. 412). The fact that CILCO has chosen not to do this is not a reason for declaring the LS schedule unjust, unreasonable or unduly discriminatory, nor for developing a special rate schedule solely for CILCO, nor for allowing CILCO to remain a G customer and swing on Panhandle's system.
>
> Significantly, there is no evidence to suggest that it would be prohibitively expensive for CILCO to

> modify its existing storage capabilities and thereby adapt itself to the LS rate schedule. If CILCO did this it could flatten out its contract demand requirements and use the LS schedule without any change in its use or load characteristics. Mr. Pittner testified on behalf of Panhandle that CILCO readily could have improved the overall reliability and integrity of its system by adding compression to its centrally located storage capacity, and that the additional compression could be added at a relatively low cost (Ex. 179, pp. 10-11). [*Id.*, at p. 65,324.]

It is, of course, correct that the decision in the Panhandle rate case was issued in September 1985 prior to the Commission's issuance of Order Nos. 436 and 436-A. However, the status of full requirements customers was covered in those orders in connection with the discussion of the contract demand adjustment rights, Order No. 436 at p. 31,530. There, the Commission noted that, to the extent full requirements contracts or rate schedules containing sole supplier clauses prevent a customer from making use of the rule's transportation services, they are inconsistent with the contract demand adjustment rights. The Commission noted that Sections 284.10(c) and (d) make this clear by providing that a pipeline subject to that section must agree to offer its customer those options. The Commission indicated that, for a pipeline with sole supplier clauses, the agreement would necessarily include an agreement to modify any existing contract terms that would prevent the reduction or conversion. The Commission then stated, however:

> We do not necessarily agree, however, with the argument of these commenters that customers that previously purchased under a full requirements rate should be allowed to continue to purchase under that rate schedule even though they no longer purchase their full requirements from the pipeline. There can be differences in the costs of providing full and par-

> tial requirements service. If there are such differences, and if the rates fairly reflect these differences, we can perceive no reason why a partial requirements customer should be allowed to purchase under the full requirement rate schedule. It is a question of fact whether the existing full and partial requirements rate schedules appropriately reflect these differences in costs. [*Id.*]

Moreover, the Commission specifically addressed CILCO's arguments on this point in Order No. 436-A at p. 31,669. After reaffirming the position cited above that it had taken in Order No. 436, the Commission stated:

> The Commission sees nothing in CILCO's or Illinois' arguments, however, that warrants a different conclusion. The full requirements rate schedule establishes certain criteria that customers must meet in order to be subject to the full requirements rate schedule. (The full requirements rate schedule is typically a more favorable rate schedule than a partial requirements rate schedule, in terms of the price that is paid for a unit of service.) If after taking advantage of a reduction or conversion the customer still complies with the criteria for being a full requirements customer, then that customer should continue to be a full requirements customer. If that customer no longer meets the criteria for a full requirements customer after a reduction or conversion, then that customer would be a partial requirements customer and come under whichever rate schedule that meets the customers current contract.

These discussions by the Commission in Order No. 436 and Order No. 436-A make it clear that a pipeline would be justified in insisting that a full requirements customer transporting for system supply become a partial requirements customer where the differences in the costs of providing the two services is established and justifies the change to partial requirements status.

In the present case, Judge Liebman's thorough analysis that has been set out above establishes the differences involved in providing full and partial requirements services on Panhandle's system. In addition, there was independent evidence at hearing showing the differences between the customer classes and the contractual benefits of the full requirements customers. These include, *inter alia*, lower summer contract demands, no minimum commodity bills and a 10 percent ratchet in determining the amount of demand charges paid monthly (Panhandle Ex. 30, p. 10). Moreover, a G rate customer affirmed that the benefits of buying gas under the G rate outweigh the advantages of changing customer classification, noting specifically the 90 percent ratchet and variable contract demand (Tr. 683). It was also brought out that the short-term nature of the transportation arrangements made by partial requirements customers is another reason to prefer the supply security of the G rate class (Tr. 693). The above detailed differences in the benefits and costs relating to providing full and partial requirements service adequately justifies Panhandle's insistence that a full requirements customer become a partial requirements customer if it elects to transport gas for system supply.

It should be pointed out that this problem indeed may well be mooted if Panhandle's application for a blanket certificate under Order No. 436 is granted. In that event, CILCO may be able to accomplish its objective of securing gas from the spot market for its system supply, depending upon the level at which CILCO elects to exercise its contract demand conversion and/or reduction rights.

In the meantime, however, the current interim transportation for G rate customers under Section 311 of the NGPA cannot be construed as requiring Panhandle to transport gas for system supply of its G rate customers. The interim authority under Section 311 contains a waiver of the applicability of the contract demand conversion and reduction requirements of Order No. 436.

This waiver of contract demand adjustment rights makes Panhandle's preclusion of transportation for the system supply of G rate customers under the interim Section 311 authority a reasonable approach. For the same reason, it is justified for Panhandle not to seek Section 7(c) authorization to transport gas for the G customers for their system supply unless they agree to become LS customers. This does not constitute any restriction of the contract demand adjustment rights provided for in Order No. 436, since the Section 7(c) applications do not come under the auspices of Order No. 436 and it is not appropriate to impose the specific terms and conditions of Order No. 436 on Section 7(c) applications. Proceeding under Section 7(c) is explicitly recognized in Order No. 436 as an alternative to the blanket certificate approach provided for in Order No. 436. The Commission stated in Order No. 436 at p. 31,463, that traditional sales and transportation options remain available to pipelines and their customers under the Commission's existing certificate authority.

This is not to imply, however, that a pipeline such as Panhandle, in employing its self-implementing Section 311 transportation under the interim authorization or in applying for Section 7(c) transportation authority, can lawfully engage in conduct that is unduly discriminatory by denying shippers or producers reasonable access to transportation on its system or by showing a preference to any producer, shipper, marketers, LDCs or end-users. This would clearly be in violation of the nondiscriminatory access teachings of the Maryland People's Counsel cases and of the Commission policy regarding equal access to transportation that is embodied in the rationale underlying Order No. 436. In this particular instance, however, Panhandle's interpretation of Section 1.9 of its tariff requiring a G rate customer who wishes to transport gas for system supply to become an LS customer, is not a discriminatory restriction on access to transporta-

tion. Rather, this posiiton has justification in the differences in the costs and benefits of the two customer classes. These differences were extensively delineated in the last rate case and were further supported by evidence in this cause, including proof that it is economically feasible for a G rate customer to switch to the LS rate. Therefore, it is not unreasonable or inequitable to require a G rate customer to become an LS rate customer as a prerequisite to having gas transported for its system supply. There is, therefore, based on the Section 1.9 arguments, no valid grounds for conditioning the Section 7(c) applications on a requirement that Panhandle offer to transport gas for system supply for G rate customers or for ordering Panhandle to offer such transportation under its interim Section 311 program.

One further argument raised by CILCO deserves closer attention. CILCO points out that Section 1.9 does not prohibit purchases from all producers, only those that are natural-gas companies as defined in the NGA. CILCO then notes that in 1978 the definition of natural-gas company under the NGA was changed to exclude persons making sales of natural gas if (a) the gas to be sold was not committed or dedicated to interstate commerce on November 9, 1978 or (b) the gas is assigned to an interstate pipeline or local distributing company by an intrastate pipeline as surplus gas. In this regard, CILCO relies on Section 601 of the NPGA, 15 U.S.C. § 3431, and argues that there are producers that are not natural-gas companies as defined in the NGA with respect to all or a portion of their gas supplies. CILCO notes that its 1983 request for transportation specifically pointed out that it was seeking to transport gas from producers willing to consummate contracts for first sales of NGPA categories 102 and 103 gas. (CILCO Ex. 2, p. 1.) CILCO reasons that first sales of natural gas which qualify under Sections 102(c) and 103 of the NGPA do not constitute a purchase from a natural-gas company as defined in the

NGA. Therefore, CILCO argues that it should at least be able to purchase this gas for its system supply, and still continue as a G rate customer for its remaining purchasers.

The CILCO position must, however, be rejected. Section 2(6) of the NGA, 15 U.S.C. § 717(a)(6), defines a natural-gas company as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale". While the NGPA in Section 601, 15 U.S.C. § 3431, does exclude from the definition of a natural-gas company certain persons if the provisions of the NGA and the jurisdiction of the Commission do not apply to certain specific sales made by those persons, it did not alter the underlying definition. The purpose of Section 601 of the NGPA is to shield from Commission jurisdiction certain independent producers, who had been held to be natural-gas companies under the NGA in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), thereby effectuating a partial reversal of the *Phillips* case, Order No. 436 at p. 31,470. *See also Transwestern Pipeline Company v. F.E.R.C.*, 747 F.2d 781, 783-84 (D.C. Cir. 1984). It would be inappropriate to construe Section 601 of the NGPA as intending to alter the basic relationships between pipelines and their customers, where classes of customers have been established based on longstanding relationships that take into account the costs and benefits connected with the various customer classes. Since the Section 1.9 tariff language relating to the G rate customers was in place in the 1950s and far predated the NGPA, it is more reasonable to interpret that provision in light of the definition of a natural-gas company extant when Section 1.9 became effective.

Further, what CILCO proposes to do is buy the Section 102 and 103 gas out-of-state, and have it transported by Panhandle for resale by CILCO in Illinois. Even assum-

ing, as CILCO suggests, that Section 601 of the NGPA must be taken into account, the result would not be altered for tariff interpretation purposes. The Commission has recognized that transportation affected by Section 601 does not remove that transportation from interstate commerce but renders the transportation non-jurisdictional, *Delphi Gas Pipeline Corp.*, 19 FERC ¶ 61,189, at p. 61,366 (1982). Therefore, since the transportation involved would be in interstate commerce, it follows that the out-of-state sale to CILCO would be a sale for resale in interstate commerce, thereby making the producer a natural-gas company for tariff interpretation purposes.

Moreover, to interpret Section 1.9 as CILCO proposes for Section 102 and 103 gas would have inequitable effects inimical to the public interest. First, it would be inequitable to Panhandle since it would probably have, if employed by a number of G rate customers, a bad effect on Panhandle's take-or-pay exposure and this would be detrimental to the other customers on Panhandle's system. Of more importance, however, is that it would be unfair to Panhandle's partial requirements customers. Transporting gas for system supply, while at the same time allowing the G rate customers to retain the more favorable benefits of the general service class, would mean that Panhandle would be granting the G rate customers an undue preference. In this regard, Panhandle would be affording the LS rate customers the same transportation service but not offering or providing them the more favorable benefit of the G rate class. This would make the transportation for the G rate customers, whether accomplished under Section 311 or Section 7(c), unduly discriminatory and in violation of Section 4(b) and 5(a) of the NGA, 15 U.S.C. §§ 717c(b) and 717d (a), as well as in violation of Section 284.9(b) of the Commission's regulations, 18 C.F.R. § 284.9(b), if Section 311 is used. Therefore, this latter aspect of the CILCO position on Section 1.9 must also be rejected.

V. The Interim Section 311 Transportation

A. *The IPAMS Position*

Before discussing the details of the IPAMS position, it is in order to identify IPAMS. IPAMS is an association comprised of producers and marketers of natural gas produced in the Rocky Mountain states, including Colorado. Its members have producing properties adjacent to the pipeline facilities of Panhandle and CIG, primarily in the Denver-Julesburg Basin (D-J Basin) north of Denver, Colorado. Hearing Order, 36 FERC ¶ 61,282, at p. 61,702, fn.1 (1986).

In particular, IPAMS alleged that Panhandle acted to disrupt the market for self-help gas on its system and created an anti-competitive and undue advantage for its marketing affiliate, Panhandle Trading Company (PTC). In this regard, IPAMS contends that Panhandle embarked on a course of action designed to insure that PTC would maintain and increase its market penetration in Panhandle's service area. The IPAMS complaint averred that, upon the effective date of Order No. 436, Panhandle refused to engage in Section 311 transportation under the NGPA even though to do so would not have exposed Panhandle to the contract conversion and reduction conditions of Order No. 436 as embodied in Section 284.10 of the Commission regulations, 18 C.F.R. § 284.10. IPAMS alleged in its complaint that the timing of Panhandle's decisions, first to cease self-implementing transportation and then to recommence such transportation, was designed to confer on Panhandle and PTC an undue competitive advantage to achieve unwarranted market dominance on the Panhandle system. IPAMS contended that in April 1986, when Panhandle again began providing self-implementing transportation service pursuant to Section 311 of the NGPA, Panhandle did not inform the general public of its pending decision to become an open-access transporter until after PTC had an oppor-

tunity to secure supplies and markets for gas, based on its advance knowledge of Panhandle's announcement. This, IPAMS claims, disregarded the Commission's imposed condition that interim Section 311 transportation be rendered on a nondiscriminatory basis. Hearing Order, 36 FERC at pp. 61,695-96.

Moreover, IPAMS' complaint asserted that Panhandle set up barriers to spot gas sales by IPAMS members by misquoting, or by an inability to quote, transportation and gathering rates and by giving misinformation regarding Panhandle's capacity, while at the same time markets were being lined up for PTC in the first few weeks after Panhandle announced in April 1986 that it would transport gas under Section 311, *id.* at p. 61,696.

As to relief, IPAMS asked in its complaint that the Commission order Panhandle to transport gas for anyone requesting transportation and further requested that, if Panhandle refuses transportation, Panhandle be prohibited from transporting gas for PTC. IPAMS also asked that Panhandle's Section 7(c) applications be conditioned with a nondiscriminatory access condition. *Id.*

Because of the very broad nature of the issues set for hearing (for example, whether Panhandle's transportation policies have been or currently are unduly discriminatory, whether the Section 7(c) applications demonstrate a pattern of undue discrimination, whether Panhandle has engaged in any anti-competitive behavior that is unduly discriminatory under the Natural Gas Act, *etc.*, *id.* at p. 61,701), IPAMS expanded its complaint against Panhandle to espouse the complaint, pursued mainly by CILCO, regarding the alleged failure to transport for G and SG rate customers; to criticize Panhandle's blanket certificate application under Order No. 436 which is pending in the non-consolidated Docket No. CP86-585-000; and to complain about the December 1, 1986 curtailment by Panhandle of interim interruptible Section 311 transportation. (IPAMS Initial Brief, pp. 7-9.)

IPAMS contends that the central issue that must be resolved in this cause is whether Panhandle's actions constitute undue discrimination under the NGA and the NGPA. IPAMS points out that Section 4(b) of the NGA, 15 U.S.C. § 717c(b) expressly prohibits a pipeline providing transportation service from granting any undue preference or advantage to any person and/or from subjecting any person to any undue prejudice or disadvantage. Moreover, IPAMS points out that Section 7(e) of the NGA, 15 U.S.C. § 717f(e), requires all interstate transportation of gas to meet the public convenience and necessity standard, which incorporate the general requirements of Section 4 of the NGA, in particular, the requirement that transportation be offered on a nondiscriminatory basis. IPAMS further states that Section 311 of the NGPA incorporates by reference the rate standards of the NGA and, therefore, also prohibits a pipeline from engaging in undue discrimination in the provision of transportation. In addition, IPAMS notes that the admonition against undue discrimination in the provision of transportation services is also contained in the Commission's NGPA regulations since Section 284.8(b), 18 C.F.R. § 284.8(b), requires that firm transportation service be provided without undue discrimination or preference, and Section 284.9(b), 18 C.F.R. § 284.9(b), imposes the same obligations with respect to providing interruptible transportation service.

Further, IPAMS cites Order No. 436 for the proposition that nondiscriminatory access to transportation is a cornerstone for the rule and the basis for reaching the goals of consumer protection and competition in the NGA and NGPA. In this regard, IPAMS points to the following language in Order No. 436 at p. 31,494:

> Nondiscriminatory access to self-implementing transportation service under Section 7 of the NGA and Section 311 of the NGPA is a cornerstone of the Commission's final rule.

> Pipelines that provide transportation services on a nondiscriminatory basis are assuring that the benefits of competitively priced gas supplies and transmission services are being made available to the broadest number of consumers. In addition, opening up transmission capacity on an across-the-board basis helps to achieve a traditional utility rate-making goal of maximizing throughput in order to spread fixed costs over the greatest number of customers.
>
> On the other hand, permitting pipelines to unduly discriminate or to exclude certain consumers from transportation services is inconsistent with the fundamental goals of consumer protection and competition in the Natural Gas Act and the Natural Gas Policy Act. [Footnotes omitted.]

Moreover, IPAMS submits that the provisions in Order No. 436 prohibiting undue discrimination in transportation were premised on the findings by the U.S. Court of Appeals for the D.C. Circuit in the Maryland People's Counsel cases: *Maryland People's Counsel v. F.E.R.C.*, 761 F.2d 768 (D.C. Cir. 1985) (MPC-I); *Maryland People's Counsel v. F.E.R.C.* 761 F.2d 780 (D.C. Cir. 1985) (MPC-II); and *Maryland People's Counsel v. F.E.R.C.*, 768 F.2d 450 (D.C. Cir. 1985) (MPC-III). IPAMS argues that the MPC decisions establish that a transportation program that has the effect of segmeting gas markets (so that certain classes of customers, such as fuel switchable end-users, have access to transportation while captive LDCs and the retail customers do not have the same access) is unduly discriminatory under the NGA.

In addition, IPAMS cites a recent Commission decision in *Southern Natural Gas Company*, 36 FERC ¶ 61,275 (1986), as a showing of the Commission's concern that transportation be offered on a nondiscriminatory basis. There, Southern's program involved multiple Section 7

(c) applications and not an Order No. 436 self-implementing blanket certification program. IPAMS submits that the Commission emphasized Southern's obligations to provide transportation on a nondiscriminatory basis when it noted that "Southern remains subject to all provisions of the Natural Gas Act and our regulations, including those relating to undue discrimination and preferential treatment," *id.* at p. 61,680.

In conclusion, IPAMS argues that Panhandle's transportation practices and policies, when viewed as a whole, were designed to and have successfully segmented its market between industrial end-users with fuel switching capabilities and captive customers who, because of Panhandle's refusal to transport gas for supply of full requirements LDCs, are forced to continue to buy Panhandle's high-priced gas. Further, IPAMS contends that these policies and practices have favored Panhandle's marketing affiliate, PTC, by allowing it to dominate the spot market when Panhandle opened its pipeline for interim Section 311 transportation and by continuing to provide benefits to PTC.

B. *EnTrade's Position*

EnTrade Corporation (EnTrade) is the only natural gas marketer and, therefore, the only competitor of PTC to intervene and participate in the proceeding. EnTrade criticizes certain activities by Panhandle in reopening the pipeline for interim Section 311 transportation in the Spring of 1986. In particular, EnTrade contends that it was discriminatory for Panhandle to give its large full requirements and partial requirements LDC customers prior notice of its intention to reopen, because this gave those customers a head start on securing priority of transportation and a favorable position with regard to future curtailments, such as happened on December 1, 1986. Moreover, EnTrade contends that PTC secured preferential treatment upon the reopening of the pipeline

for Section 311 interim transportation. (EnTrade Initial Brief, pp. 5-13.) As a result, Entrade asks that PTC be prohibited from entering into transactions involving transportation by Panhandle or that Panhandle restructure PTC to eliminate its unfair advantage and to submit such reorganization to the Commission. EnTrade also asks that curtailment on Panhandle for the 1986-87 heating season be on a pro-rata basis to eliminate the remaining effects of the discriminatory practices that occurred when Panhandle reopened for interim transportation in the Spring of 1986. (Id. at 13, 14.)

C. *The Staff Position*

The Staff takes the position that Panhandle, in April and May of 1986, provided interim transportation in an unduly discriminatory manner because: Panhandle conditioned provision of transportation for its G rate customers on the G rate customers agreeing not to request such transportation for system supply; Panhandle gave its full and partial requirements customers advance notice regarding its commencement of the interim transportation; and Panhandle refused until May 14, 1986, to use the exchange agreement it had with CIG to implement such transportation (Staff Initial Brief, p. 18).

Staff further takes the position that, as a remedy, the Commission should restore the *status quo ante*, that is, put the parties back in the position they would have been had no violation occurred. Relying upon *Black Marlin Pipeline Company*, 21 FERC ¶ 61,008, at p. 61,027 (1982), Staff urges that restitution should be required in this case by having Panhandle and PTC determine the profits they received from the transportation involved and refund those amounts, with interest, to the entities discriminated against, that is, the G rate customers. The Staff would do this by having Panhandle compute its return on equity gained from providing the interim transportation and adding to that the profits made by PTC

on the transactions that it was involved in when Panhandle opened for interim transportation in the Spring of 1986. (*Id.* at 26-30.) A further relief sought by Staff is a reordering of Panhandle's priority list of shippers by setting a new priority list based on which companies make the earliest request for transportation beginning at 9:00 AM on a given date (*id.* at 30, 31).

D. *Panhandle's Position*

Panhandle points out that IPAMS presented only one witness, Mr. David Wilson, who is IPAMS's president, to testify against Panhandle. Panhandle notes that, although IPAMS is a 1,200 member organization, the only member claiming to have suffered as a consequence of the alleged discriminatory conduct of Panhandle is Mr. Wilson's business, Independent Gas Marketing (IGM), an entity which never has purchased or sold gas or engaged in any transportation as shipper, agent or in any other capacity (Panhandle Ex. 8, pp. 3, 4; Tr. 407-08, 419-24).

In addition, Panhandle asserts that the evidence showed there was no misquotation of rates, no mysterious capacity unavailability and no attempt by Panhandle to favor its marketing affiliate, PTC. Further, Panhandle argues that PTC did not and could not obtain market dominance—nor is it likely that any other marketer could—because such companies trade in short-term transactions and could not obtain entitlements to transportation capacity themselves. Panhandle notes that shipper purchasers simply add new marketers to the list of sellers under the transportation entitlements, with no loss of their place in line for transportation capacity, and that such purchasers switch from one marketer to another and from one transporter to another based on the most competitive price. (Panhandle Initial Brief, p. 9.)

Moreover, Panhandle submits that its discontinuance of certain transportation services on October 31, 1985, was not intended to disrupt the spot market and that it

did not do so. Panhandle asserts that the termination of the transportation services was pursuant to Commission orders requiring that those programs terminate. (*Id.* at 9-10.)

Further, Panhandle argues that it appropriately took time to consider both (1) whether and how it would embrace interim open access transportation for its customers to relieve the serious problem of load loss to alternate fuels, and (2) whether and how to commence open access transportation on a more permanent basis. Panhandle asserts that its consideration of problems attendant to commencing the short-term interim program necessarily involved prevention of the violation of the terms of its sales tariffs. Panhandle submits, in view of the numerous disputes that had erupted from CILCO's repeated attempts to circumvent its tariff, that Panhandle reasonably sought to assure itself that opening for interim transportation would not turn into but another round of that litigation. In Panhandle's view, these consequences would be counter-productive as the company attempted to reach longer-term accommodations with customers to enable it to become an open access transporter for an extended term. Panhandle asserts that its consideration neither involved any cloak of secrecy nor any improper agreements. (*Id.* at 10.)

Moreover, Panhandle takes the position that the concern expressed by Panhandle and CIG regarding the applicability of the exchange agreement to third party gas was genuine and well-founded. Panhandle points to certain factors that had to be looked at to make the determination of whether the exchange agreement could be used for third party transportation. In particular, Panhandle cites the certificate condition prohibiting the use of the exchange agreement by parties other than Panhandle and CIG, and the impact of the requirements of Order No. 436 on third-party transportation. (Panhandle Reply Brief, pp. 9-11; Panhandle Ex. 53, p. 45; Tr. 2002.)

E. *Analysis and Resolution*

Initially, certain of the controversy in this section can be eliminated because of the ruling in the Section IV, *supra,* that Panhandle's interpretation of tariff Section 1.9 to preclude transportation for G rate customers for system supply, unless these customers are willing to become partial requirements LS customers, is appropriate and does not result in any undue discrimination toward the G rate customers. Since Panhandle was and is willing to transport gas for the system supply to G customers as long as they change their customer status, it logically follows that Panhandle did not act in any discriminatory fashion in attempting to secure and securing commitments from its G rate customers that they would not request transportation for system supply when participating in the interim Section 311 transportation program that Panhandle commenced in April 1986. Panhandle has the same rationale for requiring the commitments, that is, that such transportation of gas for system supply would violate Section 1.9 of its tariff. In light of this, the position taken by IPAMS and Staff regarding discrimination against the G rate customers in connection with the opening in April 1986 and the subsequent operation of the interim Section 311 transportation program by Panhandle, must be rejected.

It is in order at this juncture to deal with the other commitment sought by Panhandle from its G rate customers in connection with reopening of the system in April 1986. In the letter Panhandle sent to its G rate customers on March 27, 1986, Panhandle indicated that it would be better not to commence or continue with an interim transport program if Panhandle would be confronted with or exposed to additional controversy or litigation with resale customers (Tr. 2303-04). The record shows that there was extensive controversy and litigation over the issue of transporting gas for system supply of the

G rate customers, particularly as waged by CILCO. Therefore, this concern of Panhandle and its attempts to get assurance that it would not be confronted with further expensive litigation cannot be considered unreasonable, particularly when the interim program was at the time set to expire by the end of June 1986 and where there was a compelling reason for starting the program, that is, to assist its customers in retaining industrial load with fuel-switching capabilities, much of which was being lost to the competition with oil. Accordingly, there is nothing untoward in Panhandle's attempting to stem a possible substantial expense at the outset of what it considered to be a very short-run program. In any event, and ironically, its efforts in this regard proved to be futile, as can be seen by this most expensive litigation where multiple parties are actively pursuing complaints against Panhandle for the position it has taken regarding transportation for the system supply of its G rate customers.

1. The Development of Events

A review of events as they took place is a good starting point for consideration of Panhandle's interim Section 311 transportation activities. During the fall of 1985 Panhandle was performing four basic types of transportation. It was transporting gas being marketed under a special marketing program (SMP), PanMark, which had been certified by the Commission to assist Panhandle in dealing with take-or-pay obligations (Panhandle Ex. 8, p. 13). Also, Panhandle was performing several transportation services on the basis of certificates issued pursuant to Section 7(c) of the NGA. Further, Panhandle was authorized to perform transportation under Section 157.209 of the Commission's regulations, 18 C.F.R. § 157.209, on behalf of intrastate pipelines, interstate pipelines and LDCs for low priority end-users. Finally, Panhandle was performing Section 157.209 service for high priority end-users of the same classifications of Section 311 shippers. (Ph. Ex. 8, pp. 13-14.)

The PanMark transportation was performed pursuant to a limited term certificate, which expired October 31, 1985, *Tenneco Oil Co., et al.*, 28 FERC ¶ 61,383 (1984). Because of the termination of this program, Panhandle had to cease these transportation services on October 31, 1985.

Also, the transportation for low priority end-users under Section 157.209 was required to terminate in the absence of acceptance of all of the provisions of Order No. 436 as of October 31, 1985. Since Order No. 436 was issued on October 9, 1985, Panhandle only had a short time to evaluate whether it could operate under the terms of this order on October 31, 1985, without encountering substantial problems (PH. Ex. 8, p. 18). Panhandle's dilemma was succinctly described on the record:

> [I]t was immediately apparent that many parties of all classifications (pipelines, distributors, producers, state regulatory agencies and consumers) would be seeking stays, rehearing and review by the courts. Order No. 436 itself was very lengthy and unclear. It was so unclear that the Commission recognized the need to issue vast numbers of emergency orders and clarifications—an unprecedented regulatory procedure which made it impossible to know what the final outcome would be. The orders clarifying Order No. 436 were being issued daily and on some days many clarifications were being issued in a single day. [Panhandle Ex. 8, pp. 18-19.]

The whirlwind of activity relating to Order No. 436 has recently been described by the Commission in a November 5, 1986 order issued in Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 37 FERC ¶ 61,090, at p. 61,232 (1986):

> Order No. 436 was followed and refined by Order No. 436-A, Order No. 436-B, Order No. 436-C, Order No. 436-D, and Order No. 436-E. Each of these

orders either granted in part applications for rehearing of the underlying order, and thus amended the Order No. 436, or denied petitions for rehearing and reconsideration. At the same time the Commission responded to numerous petitions for clarification of the order, some of which were predicated on particular factual situations and others of which generally interpreted the Order's requirements. Eventually the Commission issued in excess of 130 orders, responding to approximately 200 requests for clarification or waiver, involving many aspects of Order No. 436. [Footnotes omitted.]

Therefore, whether to proceed with full Order No. 436 open access was a significant business decision and it was reasonable for Panhandle to conclude that it could not properly be made under its circumstances by the October 31, 1985 deadline for expiration of the Section 157 transportation for low priority end-users. Also, this reaction by Panhandle is supported by the following Commission analysis that appeared in Order No. 436-B, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, *FERC Statutes and Regulations* ¶ 30,688, at p. 30,138 (1986):

> The Commission recognizes that Order Nos. 436, and 436-A represent a major change in the regulation of transportation. Accordingly, and as experience since issuance of those orders has shown, the transition to this new regulatory environment will take time. We must give pipelines the opportunity to meet with their customers and suppliers to work out new requirements and new relationships. The Commission, too, is facing many issues of first impression as pipelines file applications for blanket certificates, settlements involving flexible nondiscriminatory transportation and operating conditions and requirements for implementation of new transportation service. From experience, we know that suf-

ficient time is required to give the necessary level of consideration to these new issues to find appropriate resolutions.

Based on the above, it can be concluded that Panhandle made responsible business decisions (1) not to open its pipeline for the interim Section 311 transportation in November 1985, even with the waiver of the contract demand adjustment rights, and (2) not to proceed with an Order No. 436 blanket certificate application at that time. Under the circumstances, Panhandle's decision to review the matter was a reasonable course, particularly in light of the momentous impact of Order No. 436 and its progeny. Accordingly, the allegations that Panhandle took this position in an effort to disrupt the spot market or to gain an anti-competitive advantage either in connection with its sales service or its marketing affiliate, PTC, must be rejected. Panhandle had very valid reasons, as noted above, for approaching Order No. 436 as a matter that needed serious and extended consideration.

Panhandle did, however, after October 31, 1985, continue to transport for two categories of shippers, those whose transportation was authorized under Section 7(c) and the high priority end-users receiving Section 157 service from their Section 311 shippers (the grandfathered transportation). In addition, in connection with the latter transactions, PTC was a seller in only nine of the 105 grandfathered transactions (Panhandle Ex. 16). On the other hand, PTC was the seller on 5 of the 56 Section 157 low priority transactions that were terminated by the expiration of that authority on October 31, 1985 (Panhandle Ex. 17). As a result, PTC lost a little over a third of its sales by Panhandle's electing not immediately to provide interim Section 311 transportation on November 1, 1985. Further, a review of the two pertinent exhibits (Panhandle Exs. 16 and 17) would indicate that PTC does not appear to have been left in any more favorable or less favorable position than the

other shippers that retained grandfathered transportation transactions and lost low priority transportation transactions.

The record, therefore, does not support IPAMs' contentions that PTC would not be harmed by the closure decision to the same degree as many unaffiliated suppliers and that Panhandle could elect to close its system to new blanket transportation without significant harm to PTC. Indeed, PTC sustained a loss of substantial transportation revenues since over a third of its transactions were terminated by Panhandle's election not to open for blanket transportation under Section 311 on November 1, 1985.

Nor is IPAMS' criticism of the timing of the cessation of the transportation on November 1, 1985, warranted. IPAMS contends that Panhandle could afford to shut off its system without substantial revenue loss at that time because the winter heating season causes a rise in its temperature sensitive load and, therefore, generates more revenues from its sales. However, it is clear that the November 1, 1985 date was not selected affirmatively by Panhandle for cessation of certain transportation but rather was a date triggered by Commission action. It is not warranted, therefore, to impute to Panhandle an anti-competitive intent because the date established by the Commission happens to coincide with the beginning of the Winter heating season.

Another issue regarding the decision by Panhandle to take time to consider whether to offer interim Section 311 transportation involved the fact that its affiliated pipeline, Trunkline Gas Company (Trunkline), made the decision almost immediately and commenced such transportation in November 1985. The difference in the approach by the two pipelines was, however, adequately explained. In Trunkline's case, the more expeditious move to open for interim transportation was required by an overriding financial consideration. Trunkline was

concerned that it might lose one of its largest customers, Consumers Power Company (Consumers), if it did not agree to provide transportation for Consumers. It was brought out that the loss of Consumers could have had such a large effect on Trunkline that it might threaten Trunkline's financial viability. Accordingly, Trunkline had little choice but to assume the risks inherent in embarking on the interim Section 311 transportation program while its sister pipeline, Panhandle, with a more varied and diverse customer mix, was able to take a more measured course of giving more thorough consideration to Order No. 436 and its effects before offering interim transportation. (Panhandle Ex. 8, pp. 22-23.)

It is next in order to examine what occurred during the intervening period from November 1, 1985 until Panhandle announced the opening of its system for interim Section 311 transportation on April 21, 1986. Panhandle set out various matters it considered in this intervening period, including a lack of certainty on Panhandle's part as to several facets of Order No. 436; a concern that Panhandle had with regard to how the transport would affect the continuing build-up of take-or-pay exposure; and whether transporting on an interim basis would result in new litigation on Section 1.9, the sole supplier provision of its tariff (Panhandle Ex. 54, p. 12).

Of particular concern for Panhandle during this period was that it might be put in an untenable situation if it opened its system for interim transportation. If its G rate customers requested transportation for system supply, Panhandle considered it might be faced with the choice of denying the request and possibly violating Order No. 436, or of granting the request and thereby violating Section 1.9 of its tariff (Panhandle Ex. 54, p. 17). During this period, however, Panhandle was also receiving communications from their customers expressing concern about the substantial loss of fuel-switching industrial load, a problem that could be helped if Panhandle were

to open its system for interim Section 311 transportation (IPAMS Ex. 1, p. 31; MC Ex. 36).

Because of the load loss problem and Panhandle's concern over its tariff provisions, Panhandle on March 27, 1986 sent a form letter to its G rate customers inquiring about what interest they would have in interim transportation arrangements to meet the escalating fuel-switching problems that were being experienced on Panhandle's system (MC Ex. 36, p. 4; Tr. 2303). This same letter referenced the litigation before the Commission and state and federal courts concerning the ability of G rate customers remaining in that class if they purchased gas for system supply. The letter indicated that, in Panhandle's view, it would be better not to commence or continue with an interim transportation program if Panhandle will be confronted with or exposed to additional controversy and litigation. The letter, therefore, requested that the General Service customers express their interest in being involved in interim transportation for a period not to exceed June 30, 1986, with the understanding that the transportation would be subject to termination on rather short notice and that such termination would occur if disputes arose over the tariff or rate consequences of the interim transportation.

The responses received by Panhandle to the March 27, 1986 letter were generally favorable from its standpoint with regard to its concern over new litigation on the sole supplier provision. Moreover, Panhandle had oral discussions in early April 1986 with its G rate customers regarding opening the pipeline for interim transportation, as part of the annual meeting that is held with its G rate customers to discuss current issues (Panhandle Ex. 54, pp. 46-47). And, on April 14, 1986, Panhandle sent a letter and a pro forma transportation agreement to its G rate customers (Panhandle Ex. 54, p. 51). At the same time, Panhandle also mailed pro forma contracts to its partial requirements customers to get the

information to all of its customers as rapidly as possible (Panhandle Ex. 54, p. 53). The pro forma contracts were sent out about April 14, 1986, and the actual decision to provide interim transportation was made about April 15, 1986. The purpose of sending the pro forma contracts out in advance was to have the information available in the event Panhandle decided to open for the interim transportation (Panhandle Ex. 54, pp. 30-40, 55).

On April 16, 1986, Panhandle sent letters to the G rate customers regarding Panhandle's intent to proceed with an interim Section 311 transportation program beginning April 21, 1986 (Panhandle Ex. 54, p. 56). At the same time, a letter announcing Panhandle's intention was sent to the five partial requirements customers of Panhandle (Panhandle Ex. 54, pp. 57-58). The partial requirements customers had engaged in transportation with Panhandle before and most of them were transporting at that time under either grandfathered agreements or Section 7(c) agreements. Therefore, the partial requirements customers had a greater familiarity with Panhandle's transportation agreements, so the letters sent to them by Panhandle differed from the letter sent to the G rate customers. (Panhandle Ex. 54, p. 58.) With regard to the third category of Panhandle customers, the SG class (20 to 30 small customers with less than 10,000 Mcf per month contract demand), these customers were informed of the opening of the interim 311 transportation by telephone. The reason for this is that the SG customer is less sophisticated than a partial requirements customer or a G rate customer. Therefore, rather than send a letter, Panhandle would generally telephone and discuss with them what Panhandle is doing. (Panhandle Ex. 54, pp. 62-63; Tr. 2305-06.)

Under these circumstances, many customers who had been contacted by Panhandle began, as early as April 1, 1986, looking into the availability of supply on the judgment that probably Panhandle would commence trans-

portation on an interim basis (Panhandle Ex. 54, p. 66). And, when Panhandle opened its system for interim transportation on April 21, 1986, it determined its capacity priorities based on the receipt date of valid requests for transportation, that is, on a first-come, first-served basis (Panhandle Ex. 54, pp. 66-67).

The next item that warrants attention is the activities relating to the exchange agreement between Panhandle and CIG. This exchange agreement permits Panhandle and CIG to each transport and exchange up to 300,000 Mcf of gas per day for the other (Staff Ex. 4, Att. Z-1, Sheet no. 583). If at the end of the month CIG volumes delivered into Panhandle's system exceed the exchange volumes by Panhandle, CIG will pay Panhandle for the excess at Panhandle's transportation rate; if the reverse occurs, Panhandle will pay CIG at the latter's transportation rate (*id.*, at Sheet nos. 593-94). This long-term exchange agreement originated in 1974 when Panhandle first commenced purchasing gas from Colorado's D-J Basin. Since Panhandle's transmission lines did not extend into Colorado in 1974, Panhandle made this arrangement with CIG to avoid having to construct expensive transmission facilities from the D-J Basin to Kansas, where the Panhandle pipeline terminates. Neither the original authorization nor the amended authorization for the exchange agreement specifically provided for CIG to transport third party gas at Panhandle's request as part of Panhandle's exchange entitlement (Panhandle Ex. 8, pp. 5-6). The current authorization for the exchange agreement was certified by the Commission on May 7, 1980, *Panhandle Eastern Pipe Line Company*, 11 FERC ¶ 61,141 (1980).

In early April 1986, when Panhandle was considering whether to provide interim transportation, a question was raised as to whether Panhandle may request, as part of its exchange entitlement, that CIG transport gas owned by third party shippers (Panhandle Ex. 8 at pp. 5-6).

On April 10, 1986, Panhandle contacted CIG and asked CIG to examine the question of whether third party gas could be transported pursuant to the exchange agreement. Sometime before April 21, 1986, CIG responded to Panhandle that, in its view, the exchange agreement permitted Panhandle to request the transport of third party gas, as long as the gas was to be transported to Panhandle's market area. (Staff Ex. 4, p. 9.)

Panhandle, however, at about this April 21 timeframe, took the opposite position, that is, that third party gas could not be moved under the exchange agreement but that shippers would have to make their own transportation arrangements with CIG (Staff Ex. 3, pp. 36-37, Att. SP-3; IPAMS Ex. 6). This position, however, caused problems for the Colorado producers since the additional charge that they might have to pay to CIG for making independent transportation arrangements would make it difficult for them to get a reasonable net-back price for their gas. It also triggered internal questions at Panhandle regarding why Panhandle was not allowing third party transportation under the exchange agreement since similar transportation had been permitted under the PanMark program. (Staff Ex. 3, Att. SP-3; IPAMS Ex. 6.)

Other factors were also involved in Panhandle's consideration of the exchange agreement. First, the matter was under legal review (Staff Ex. 3, pp. 45-46). Also, Panhandle did not want to take any action that would jeopardize its position or CIG's position with respect to Order 436 and the consequences that might follow (Tr. 2002). This issue arose because the interim transportation instituted by Panhandle on April 21, 1986 was pursuant to Order No. 436, and Panhandle knew that Order No. 436 would require it to provide transportation pursuant to a transportation and exchange agreement, such as the exchange agreement between CIG and Panhandle (Tr. 2289). There was, therefore, concern that, if it used

the exchange agreement for the third party transportation as required by Order No. 436, Panhandle might violate the certificate granting the authority for the exchange agreement, which only specifically allowed transportation by Panhandle or CIG. In addition, there was confusion during this period over the rate for third party transportation. If the exchange agreement was used, Panhandle would have to absorb in its 42¢ per Mcf transportation rate, the 39¢ per Mcf charge it would have to pay CIG in connection with the transportation. If, however, the exchange agreement was not used, the shippers would have to make separate arrangements with CIG, and the CIG rate would be added to Panhandle's transportation charge. (Panhandle Ex. 8, pp. 6-8.) As mentioned above, this latter arrangement would cause problems for the Colorado producers.

The exchange agreement matter remained under study at Panhandle until May 14, 1986, when Panhandle revised its position and concluded that the exchange agreement could be used to transport released gas to Panhandle's market area. Under this arrangement, Panhandle did absorb the CIG charge in its 42¢ transportation rate and substantial third-party gas was thereafter transported under the exchange agreement. (Panhandle Ex. 8, pp. 9-10; Staff Ex. 3, pp. 45-46, Att. SP-3.)

Another aspect that must be examined is the actions of PTC and its relationship with Panhandle from November 1985 through April and May of 1986. PTC was chartered on June 13, 1984, but it did not make its first commercial arrangement until April 1985. PTC was some twelve to eighteen months late in actually starting operations and was not fully staffed until September 1985. (IPAMS Ex. 1, p. 19.) As discussed above, PTC did not appear to be any more favored with regard to the grandfathered transportation, or with regard to the transportation that was discontinued in November 1985, than the other shippers on Panhandle's system, so the

focus can now be turned on subsequent actions taken by PTC and its relationship with Panhandle.

First, however, a brief description of PTC is in order. PTC purchases and resells gas on the spot market, and its compensation is derived from the margin between its purchases and its resale prices (Staff Ex. 7, pp. 8, 20-21). PTC also arranges transactions for transportation of gas from producers to end-users, the type of activity involved in the interim Section 311 transportation on Panhandle. In addition to its corporate structure, PTC consists of a General Manager and 12 employees (Tr. 1844). Part of the PTC staff solicits sellers of gas on the spot market and the remainder looks for perspective buyers of such gas (Staff Ex. 7, pp. 8-9).

Degarding PTC's corporate structure, Mr. F. J. Fowler, the General Manager, reports directly to Mr. Dan Kelley, a Vice President of PTC, who is also a Senior Vice President of Panhandle. In addition, Mr. Kelley is an officer of both PTC and Panhandle. Further, the Panhandle Group Vice President to whom Mr. Kelley reports is an officer of both PTC and Panhandle. (Panhandle Ex. 54, p. 5; Tr. 1819, 1838, 1897.)

As to PTC's operations, Mr. Kelley has the ultimate decisionmaking authority (Tr. 1839). Mr. Kelley has the authority to execute contracts on behalf of PTC and is aware of every contract signed by PTC (Tr. 1899, 1901). He also approves PTC's budget, including expenditures for its marketing efforts (Tr. 1869), and ultimately approves personnel additions for PTC (Tr. 1903). In addition, Mr. Kelley approves pay raises for all PTC personnel, including the General Manager (Tr. 1847). Further, Mr. Fowler keeps Mr. Kelley informed of PTC's activities on a weekly basis at staff meetings held by Mr. Kelley (Tr. 1840-42). Mr. Kelley, who has the ultimate decisionmaking authority at PTC, is the Senior Vice President who has responsibility at Pan-

handle for the Marketing and the Transportation and Exchange (T and E) Departments (Tr. 1839-40).

At the weekly staff meetings held by Mr. Kelley, the directors of Marketing and T and E for Panhandle are present as well as Mr. Fowler of PTC (Tr. 1840, 1903). The purpose of these weekly meetings is to keep Mr. Kelley informed as to what is going on in each of these areas and to discuss problems in these areas (Tr. 1840). In addition, after the issuance of Order No. 436 and prior to April 21, 1986 when Panhandle opened its system for interim transportation, there were numerous discussions at these meetings concerning Order No. 436 and its impact on Panhandle and PTC. Mr. Fowler also met individually on this with Mr. Kelley and with the head of Panhandle's T and E Department (Tr. 1841, 1843, 1857-62, 1901-04.) It is clear, therefore, that transportation problems were discussed between PTC and Panhandle, and that this at times helped PTC in its activities (Tr. 1904).

Between November 1985 and April 1986, PTC continued to develop relations with and to distribute form contracts to entities that might want to buy or sell spot gas should one of the pipelines in the area, Panhandle, ANR Pipeline Company, or Natural Gas Pipeline Co., decide to provide interim transportation (Tr. 1926). This marketing effort required PTC to spend about $350,000 in the first few months of 1986 (Tr. 1870), and Mr. Kelley would have been aware of and approved this effort because of his supervisory role at PTC.

In the first week of April 1986, Mr. Fowler learned from two of Panhandle's G customers, Kokomo Gas & Fuel Company and Michigan Gas Utilities Company, that there was a likelihood that Panhandle was going to initiate interim transportation (Tr. 1925). Based on these discussions and subsequent discussions with other Panhandle customers, PTC began to redirect its marketing efforts more toward securing gas that could be trans-

ported by Panhandle (Tr. 1926). To do this, PTC instructed its salesmen to assess, from their prior contracts with prospective sellers and purchasers of gas, how much supply and how much demand for gas there would be for transportation by Panhandle (Tr. 1925-26). As the information from Panhandle's customers became more positive, PTC began calling on other sales customers (Tr. 1928). By mid April, PTC was determining the specific volumes that suppliers had available and at what price (Tr. 1944-45).

PTC's efforts directed toward using Panhandle transportation produced substantial results once Panhandle began providing interim transportation in April 1986. PTC had had approximately 200,000 Mcf per day in grandfathered transportation transactions in November 1985 and this had diminished in the Spring of 1986 to about 100 to 120 million Mcf per day (Panhandle Ex. 56, p. 50). However, in May 1986, PTC's transactions accounted for 73.7% of Panhandle's daily nominated volumes for interim transportation. And, by June 1986, PTC was involved in close to 600,000 Mcf per day of interim transportation on Panhandle. While PTC only accounted for 17.7% of the new 311 transactions in June 1986, it did capture 63% of the 311 daily nominated volumes. (IPAM's Ex. 20, p. 16.) The large volumes in May and June by PTC were accounted for by two of Panhandle's partial requirements customers, Consumers and East Ohio Gas Company (East Ohio) (Staff Ex. 7, pp. 25-26). PTC had worked on both transactions, which involved coordination of a number of suppliers (Staff Ex. 13), prior to Panhandle's official announcement regarding interim transportation (Staff Ex. 7, pp. 27-31) and PTC was able to request transportation for Consumers on the date of Panhandle's official announcement (Staff Ex. 7, p. 29). However, the PTC-arranged transportation for Consumers and East Ohio involved short-term transactions for the purpose of filling those companies' storage requirements and, following June 1986,

PTC's transaction on Panhandle have declined substantially (Tr. 1830, 1890, 1891).

2. The Specific Allegations Against Panhandle

With the above factual background, specific allegations against Panhandle can be examined. Regarding the decision not to proceed with interim Section 311 transportation on November 1, 1985 and thereby becoming subject to the requirements of Order No. 436, the facts discussed above reveal that that decision was a reasonable and well-considered business judgment on the part of Panhandle, given Panhandle's operating circumstances and the regulatory uncertainties surrounding Order No. 436 at the time. Moreover, it does not appear that the cessation of the interim transportation in November 1985 left PTC in any more or less favorable position than other marketers who were transporting on Panhandle's system at the time.

IPAMS contends, however, that there was manipulation of transportation by Panhandle to benefit both Panhandle and PTC. Allegedly, the purpose was to drive to price of spot gas down in the D-J Basin, so that PTC could purchase gas below other marketers' offers and thus increase its margin. Also, this allegedly would assure a large captive pool of gas, which could supplement the spot sale of large quantities to Consumers Power over a short period of time, with financial benefits to both Panhandle and PTC. Another alleged result was to force most D-J Basin gas into the Colorado market.

To support its accusations, IPAMS claims that one of its members, Barrett Resources Corporation (Barrett), was told by Panhandle and PTC that the exchange agreement would be inapplicable to the interim transportation and that shippers would have to work out separate arrangements with CIG, who was the recalcitrant party (IPAMS Ex. 6). In addition, Independent Gas Marketers (IGM), a gas acquisition services affiliate of one IPAMS

member, was given the same information (IPAM Exhibit 1, pp. 60-61; IPAMS Ex. 12). Also, the same type of information was given to EnTrade (IPAMS Ex. 14; EnTrade Ex. 1, pp. 7-8) as well as to another D-J Basin producer, Byron Oil (IPAMS Ex. 20, p. 30).

Review of the statement from Barrett (IPAMS Ex. 6) does show that there was a considerable confusion regarding whether the exchange agreement could be used to transport third-party gas, regarding what price it would be charged for the transportation, and regarding whether there were any capacity restraints at Haven during the late April and May timeframe. However, even assuming *arguendo* that the confusing and at times inaccurate information was given by Panhandle and PTC, the question remains as to whether Panhandle or PTC secured any advantage out of the situation and whether it was done intentionally for this purpose, or whether the alleged confusion and misinformation were merely the usual type of activity which would be expected to occur when the interim transportation was begun and when there was still uncertainty at Panhandle over use of the exchange agreement.

Concerning advantage, Panhandle itself did not benefit from the 3½ week delay while the exchange agreement was not used. Nor did Panhandle receive any excess transportation revenues since, when it did begin transportation under the exchange agreement to eligible third parties (Staff Ex. 2, Atts. M1 and M3), it was at the 42¢ rate, out of which Panhandle was paying the CIG transportation charges. Therefore, by the delay and by any incorrect information regarding possible pricing in connection with shipping third-party gas, Panhandle itself received no monetary benefit.

Similarly, the IPAMS complaint in this regard about PTC is not persuasive. During the period while Panhandle was trying to determine whether to transport third-party gas under the exchange agreement, PTC

could secure no transportation of gas out of Colorado and could not have earned any profits from such transactions. Additionally, the charge that the delay over use of the exchange agreement allowed PTC to purchase the D-J Basin gas below other marketers' offers, thereby increasing PTC's margin, is not well founded. In the first place, PTC's profit margin did not fluctuate with the price paid for the delivered gas. If the producer got a lower price, the benefit would go to the ultimate purchaser, not to PTC. There was no evidence that PTC bought gas at a lesser price and then sold it to any end-user at a higher price. Rather, PTC derived its profit by charging for making the transaction arrangements. In addition, a lower or higher transportation rate did not affect PTC's profits on a transaction. Any loss because of a higher transportation rate would be sustained by the producer on his net-back price, since additional transportation charges would have to be paid. As a result, there was no profit gained by PTC from not having the exchange agreement available or from the transportation rates involved.

Moreover, there was no profit to PTC or Panhandle in having the gas remain in Colorado to be sold in Colorado's markets. There was no evidence that PTC made any arrangements for sales in local Colorado markets that would have given it more profit than it received from its transportation transactions. As to Panhandle, it actually stood to lose transportation revenues if the gas stayed in the Colorado market.

Regarding the captive pool of gas for Consumers Power, Panhandle would receive the same transportation revenues for transporting that gas under the exchange agreement no matter who arranged for the transportation, whether it was PTC or an unaffiliated broker. Further, there was no need to build up a captive pool of gas for Consumers because there is no suggestion in the record that there was not enough Colorado gas to

meet all purchasers' needs. There was no reason, then, to build a pool in Colorado to supply Consumers. And, since PTC could not ship for Consumers during the delay over the exchange agreement, it too received no benefit from the alleged building of a pool of captive gas. Moreover, IPAMS never established what the so-called captive pool consisted of by identifying the producers and supplies involved. There was, therefore, no real definition to the IPAMS complaint on this point.

Another difficulty with the IPAMS complaint is that IPAMS never established who was injured by the PTC and Panhandle actions which IPAMS criticizes. In this regard, Barrett Resources was not making any accusations against Panhandle (IPAMS Ex. 6). Also, the results of the questionnaire and poll of the IPAMS membership revealed that none of the 400 producing members had any complaint against Panhandle in connection with its transportation activities (Panhandle Ex. 43; Tr. 502-5). It developed that the basic source of the complaint against Panhandle was IGM, the small corporation owned by Mr. Wilson, the President of IPAMS. However, IGM does not produce gas and has never produced any gas; it does not ship gas and has never shipped any gas; it does not purchase gas and has never purchased any gas; and it does not sell gas and has never sold any gas (Panhandle Ex. 8, pp. 3-4). Further it was brought out that IGM has not acquired any in-place reserves for any client nor has it ever purchased gas at the wellhead nor sold any gas to a customer (Tr. 419-424). And, Mr. Wilson did not present any evidence to show that IGM had lost any specific transaction because of Panhandle and/or PTC. It is, therefore, reasonable to conclude that IGM was not an actual competitor with PTC in April 1986 and did not sustain any harm from Panhandle's or PTC's actions relating to interim transportation.

The closest case to there being actual competitive harm resulting from PTC's activities centers on the situation

that involved EnTrade/Amoco/PTC. In this regard, it is asserted that PTC had prior information about the decision to use the exchange agreement, thereby allowing PTC to purchase gas from Amoco for which EnTrade had previously been negotiating (IPAMS Ex. 1, p. 62; EnTrade Ex. 1, p. 7). When Panhandle, on May 14, 1986 or shortly before, decided that it was appropriate to use the exchange agreement for third-party gas, that change in policy was passed on to Mr. Fowler of PTC at the morning staff meeting on May 14, 1986, with Mr. Kelley of Panhandle (Tr. 1921-23). EnTrade, however, was not informed of this decision until EnTrade called Panhandle at 10:30 a.m. that morning (EnTrade Ex. 1, p. 9; EnTrade Ex. 2). But, by the time EnTrade was informed, PTC had already purchased the gas from Amoco and had the gas under commitment that morning (Tr. 1921). While this does show that PTC had advance knowledge from Panhandle of its willingness to use the exchange agreement, it does not establish that this was the reason that EnTrade lost the Amoco sale to PTC. It is clear that EnTrade had, prior to May 14, 1986, been negotiating with Amoco for purchase of the gas, the transportation for which was being held up by the Panhandle position regarding the exchange agreement. Amoco had not, however, agreed to sell the gas to EnTrade and had not negotiated the price or terms with EnTrade (Panhandle Ex. 12). And, when PTC contacted Amoco on May 14 to say that Panhandle was agreeable to transport under the exchange agreement, it is reasonable to conclude that Amoco would have realized that EnTrade would also have been able to transport the gas under the exchange agreement. Since time was not very critical—PTC and Amoco did not make their agreement final until May 21, 1986 (Panhandle Ex. 31, p. 12)—Amoco could have continued to negotiate with EnTrade if it considered EnTrade's arrangements more favorable. Since PTC and EnTrade were on equal footing as to use of the exchange agreement, a fact Amoco would undoubtedly

have realized, the short advance notice to PTC about use of the exchange agreement cannot be considered as the cause for EnTrade's losing the transaction. Moreover, this was a short-term, 30-day purchase by PTC and EnTrade has not subsequently purchased any of that Amoco gas. (Panhandle Exhibit 8, pp. 4, 5).

The only other specific incident of possible harm involved Barrett Resources. Barrett Resources indicated that it might have been able to market gas for $1.70 per Mcf rather than the $1.45-$1.50 per Mcf that was finally involved when it arranged for transportation through PTC (IPAMS Ex. 6). However, the unaffiliated broker proposing the $1.70 price was never identified nor was the purchaser at that price identified, so it is not possible to conclude that an actual sale was lost because of the exchange agreement activities. Moreover, not even the volumes involved at $1.70 and at the lower prices were specified, so there is no valid way to determine the amount of any damages.

Another assertion by IPAMS is that there was misinformation regarding capacity constraints at Haven during the period that Panhandle was initiating its interim transportation in April-May 1986. Again, whether there was such incorrect information being disseminated during the fast-moving and uncertain circumstances surrounding the opening of Panhandle for interim transportation, no profit accrued to Panhandle or to PTC as the result of this alleged incorrect information. The same rationale applies here as discussed above about the effects of the allegedly incorrect pricing information and the allegedly incorrect information regarding which party (Panhandle or CIG) was being recalcitrant about use of the exchange agreement for third-party transportation.

One other area that warrants comment is the IPAMS criticism of the December 1, 1986 curtailment of interruptible transportation by Panhandle as being anticompetitive by favoring PTC and giving Panhandle unwar-

ranted revenues (IPAMS Initial Brief, p. 9). At the hearing, however, it was brought out that this curtailment was the result of the increased load on Panhandle occasioned by the advent of the Winter heating season (Tr. 2327). Moreover, the curtailment appears to have been accomplished in a proper fashion, following appropriate last on, first off criteria consistent with first-come, first-served priority principles (Panhandle Exs. 26-29; Tr. 2326, 2333-35). There was, therefore, nothing anticompetitive relating to the December 1, 1986 curtailment nor was it shown on the record that either PTC or Panhandle gained any undue advantage from it.

Overall, based on a review of the evidence, the specific complaints of IPAMS and EnTrade discussed above must be rejected because it was not shown that Panhandle and PTC gained any undue financial benefits from the transportation activities involved, nor was it established that any party was actually damaged.

Next, attention can be turned to the Staff's allegation that providing advance notice to Panhandle's customers regarding the commencement of the interim transportation violated Order No. 436 since service must be offered to all shippers on a non-discriminatory basis to the extent capacity is available, that is, on a first-come, first-served basis. (Staff Initial Brief, p. 22.) The Staff alleges that the pipeline was granting its G rate customers and its partial requirements customers an undue preference by providing them advance information regarding the interim transportation, with the effect that those customers would be first in line when Panhandle officially opened for interim transportation, thereby giving them a preference under the first-come, first-served rule. This position is also supported by EnTrade.

The Staff's position on advance notice is, however, not persuasive. It was brought out that the type of interchange and consultation that Panhandle conducted with its customers was normal for the pipeline industry

(Panhandle Ex. 21, pp. 13-14). Further, the provisions of Section 311 of the NGPA under which the interim transportation was taking place require that the transportation be on behalf of either an LDC or an intrastate pipeline. And, Panhandle's G rate and partial requirements customers constitute virtually the entire amount of potential participants in this Section 311 service. Moreover, the other class of customer of Panhandle, the GS class, was also contacted and told of the opening of the pipeline for interim transportation, so it does not appear that there was any undue discrimination with regard to them. While there might have been some intrastate pipelines and/or some off-system LDCs who could have been interested in the Panhandle interim Section 311 transportation, no complaints have been voiced by any such entities. In addition, there is no evidence of record to establish that any such entities were interested or that they were injured in any way by Panhandle's allegedly discriminatory advance discussions with its customers.

Further, a rule of reason should be employed. Panhandle's system had been designed to serve and has been primarily paid for by its on-system customers. Because industrial load loss by those customers and potential litigation involving them were prime considerations relating to opening for interim transportation, it was reasonable for Panhandle to contact those customers before deciding to make interim transportation available. Also, Panhandle contacted all its customers regarding the opening of transportation in what appears to be a reasonable fashion, so it did not discriminate in that connection. Since Panhandle's actions were reasonable, the advance contacts should not be considered discriminatory, particularly where it was not shown on the record that any off-system entities that might have qualified for the interim transportation sustained any priority disadvantage from Panhandle's advance contacts. There is, therefore, no justification for ordering the capacity priority relief suggested by the Staff.

The Staff's other charges also warrant inspection. Staff argues that the interim transportation initiated by Panhandle in April 1986 was provided in an unduly discriminatory manner because it limited the G rate customers from having gas transported for system supply (Staff Initial Brief, pp. 20-22). In addition, Staff contends that failure by Panhandle to provide interim transportation between April 21, 1986 and May 14, 1986 unduly discriminated against shippers eligible to use the exchange agreement and granted an undue preference to other shippers who were provided interim transportation during that period. As a result, Staff argues that the interim transportation was in violation of Part 284 which is the regulatory embodiment of Order No. 436, and therefore not authorized under Section 311 of the NGPA. Consequently, Staff contends that the transportation is in violation of Sections 4(b) and 7(c) of the NGA. As a result, the Staff recommends that Panhandle be required to refund the return on equity it secured from providing the interim transportation and that PTC refund the profits that it secured from its transactions involving the interim transportation. The refunds would go to the G rate customers, the alleged victims of discrimination.

First, it has already been established in Section IV, *supra*, that Panhandle's actions in not providing transportation for system supply for the G rate customers was reasonable and non-discriminatory, so one major premise for Staff's relief is not valid. Moreover, it would not be appropriate to provide a refund to the G rate customers even if we assumed the validity of Staff's analysis. That would amount to giving a refund to the very customers who the Staff alleges gained an undue preference by having advance knowledge of the opening of Panhandle system for the interim transportation. Staff's position on this point is, therefore, inherently contradictory.

Furthermore, while it is possible that certain of the shippers in Colorado and perhaps certain other producers

might have been disadvantaged during the 3½ weeks while Panhandle was trying to determine whether the exchange agreement could be used, there is no evidence in the record that permits any reasonable assessment of damages sustained by any such shippers. The only two instances remotely close are the Barrett Resources situation and the EnTrade/Amoco/PTC transaction. As noted above, neither of these incidents form a valid basis for determining that any damage resulted from Panhandle's delay in evaluating use of the exchange agreement. They cannot, therefore, form the basis for the relief suggested by the Staff.

Overall, the Staff's arguments do not establish a sufficient basis to award restitution to any party allegedly injured by the Panhandle and PTC activities in connection with the interim transportation program that began in April 1986.

3. Domination of the Spot Market

IPAMS also contends that PTC, because of its relationship with Panhandle and its advance knowledge that Panhandle would open for interim transportation in April 1986, was able to dominate the spot market. IPAMS also argues that, by becoming first in line with these transactions, PTC was able to secure a more favorable priority position with regard to curtailment of interruptible transportation.

As to the priority contention, it is clear that PTC, as a result of arranging transactions on Panhandle under the interim transportation that began in April 1986, acquired no priority entitlements with regard to transportation on the Panhandle system. Specifically, the interim transportation is provided pursuant to Section 311 of the NGPA which requires that such transportation be on behalf of an LDC or an intrastate pipeline. Accordingly, marketers such as PTC and EnTrade cannot secure capacity entitlements since they are neither an

LDC nor intrastate pipeline. Since the capacity priority belongs to the LDC, the LDC is free at any time to change its agent or broker with no loss of its place in the entitlement queue (Panhandle Ex. 8, p. 21). That there is switching by LDCs was established. Panhandle showed the following with regard to PTC:

> In many respects, our business has evolved into a monthly bidding contest. For example, we have sold gas to East Ohio Gas Company from sources in Oklahoma. This gas is transported through Panhandle's Elk City Line. In past months, purchases from PTC were terminated by East Ohio and replaced by purchases from other suppliers on the Elk City Line. Subsequently, we have been able to again make the sale to East Ohio, when our price was more competitive. These monthly switches in suppliers by East Ohio had no impact on the transportation arrangements or capacity entitlements of East Ohio on the Panhandle system. [Panhandle Ex. 31, p. 9.]

Regarding domination of the spot market, the capacity priority situation and the ability of LDCs to switch marketers are important facets to be considered. This was confirmed by EnTrade, an independent marketer, who gave a lucid description of how the spot market operates:

> Q. So that even though EnTrade has a sale to a customer that's located so that it could utilize the Panhandle pipeline for transportation, and even though there is a still continuing contractual arrangement under which Panhandle is making that transportation capacity available, EnTrade, the marketer, with its customer can decide to use another pipeline if it is more economic to do so. Is that correct?
>
> A. We can ask to use another transportation route. The decision ultimately lies with the distributor as to which route will be applied for.

Q. And why is that, sir?

A. The distributor must request the 311 transportation on the Texas Gas system and on the Panhandle system.

Q. . . . Does EnTrade have any capacity entitlements on the Panhandle system?

A. No, sir, I would not say that we do. We sell into the Panhandle system. The customers and the distributors are the individuals who hold the capacity entitlements here.

Q. And they can make their own decision as to whether to utilize the pipeline. Is that correct?

A. Yes, sir.

Q. And in some instances, such as all of these Ohio Gas transactions, that are shown on [Panhandle] exhibit 45, the distributor can not only decide what pipeline to use, but can also decide which of these suppliers, EnTrade, Yankee, or Panhandle Trading Company, to use with Panhandle as a transporter. Is that correct?

A. I would assume that is correct, yes, sir.

* * * *

Q. From your experience sir, how long does a particular deal ordinarily last in the marketing of natural gas today by an independent gas marketer such as yourself?

A. The terms vary widely. There are sales to some customers that have considerable market power or have a particular purchasing strategy that is principally price-driven, and they typically purchase on a month-to-month basis, some times changing suppliers every month.

Other customers buy on a quarterly, six-month, annual or two-year basis. And our sales presently

range from those that are month-to-month to include a large number of customers that are contracted for an on annual basis with quarterly renegotiation. [Tr. 538-42.]

Further insight into the operation of the spot market was given by an expert who studied the situation. This established that it was not uncommon for a purchaser to change suppliers on short notice in today's aggressively competitive environment, and that this is one of the features that keeps the market prices and sales prices responsive to competitive influences (Panhandle Ex. 21, pp. 8-9).

The above description of the spot market makes it clear that the spot market is not susceptible to dominance by any one marketer. While PTC did gain a certain advantage for a short period of time (May-June 1986) by its activities prior to the opening of Panhandle for interim transportation and by its advance knowledge of such opening, as discussed *infra*, PTC did not achieve any dominance of the spot market nor any advantage regarding capacity priorities from those activities. Further, as discussed previously, it was not established on the record specifically which, if any, entities were disadvantaged by PTC's activities nor was the extent of any such damage shown on the record. It is, therefore, not possible at this juncture to provide any restitution. Nor is any capacity priority relief appropriate since PTC secured no priority entitlements from its activities. Moreover, the LDCs did not in any way act illegally in securing the transportation arrangements at issue nor is there any suggestion of any discriminatory activity by the LDCs themselves. Accordingly, it is not an appropriate remedy to disadvantage the LDCs at this time by eliminating the capacity priorities they achieved when the Section 311 transportation was opened in April 1986.

4. The Panhandle-PTC Relationship

PTC did obtain increased transactions when Panhandle opened for interim transportation in April 1986. It is uncontroverted that PTC achieved approximately a 73 percent share of the interim volumes being transported on Panhandle in May 1986 and a 63 percent share of such volumes in June 1986 (IPAMS Ex. 20, p. 16). Therefore, the relationship between Panhandle and PTC and the results that PTC achieved in securing a substantial short-term portion of the spot market on Panhandle's system in May and June of 1986 must be addressed.

It was established on the record that PTC had advance knowledge from LDC customers of Panhandle's opening for interim transportation in early April 1986, and that it began to concentrate on putting in place purchase and sales arrangements to take advantage of the opening. More importantly, it was shown that PTC had actual advance knowledge from Panhandle of the opening for interim transportation. Mr. Kelley, who had ultimate control at PTC, was also the Senior Vice President with responsibility over the Marketing and T and E Departments at Panhandle. Indeed, he was the person vitally involved with determining whether the pipeline should open for the interim transportation, so PTC had to have, because of Mr. Kelley's involvement, advance notice of Panhandle's opening for interim transportation. Also, Mr. Fowler, PTC's General Manager, attended Mr. Kelley's weekly staff meetings with senior Panhandle officials in the Marketing and T and E Departments and admitted that even negative information was valuable to him in his position as a marketer. It was also brought out that transportation was a topic often discussed at the weekly meeting and at individual discussions by Mr. Fowler with the Panhandle officials. Indeed, Mr. Fowler even was involved with the head of Panhandle's T and E Department in discussions with CIG regarding the use of the exchange agreement. Another important factor is that

Mr. Kelley knew of and approved PTC marketing efforts during the first few months of 1986. Therefore, because of Mr. Kelley's dual capacity, his knowledge of Panhandle's decisionmaking on opening for interim transportation, and his control over PTC's marketing activities, it must be concluded that PTC had advance knowledge from Panhandle of the opening for interim transportation in April of 1986 and that PTC used that advance knowledge to its advantage by securing a substantial portion of the interim transportation transactions when Panhandle began interim transportation in the Spring of 1986. Moreover, the close working relationship of Mr. Fowler with the Panhandle employees gave PTC access to inside transportation information at Panhandle and put PTC in a more favorable status than other marketers seeking to use Panhandle for interim transportation at that time.

In light of the above findings regarding advance knowledge to PTC and the relationship between Panhandle and PTC, it is warranted to conclude that Panhandle afforded PTC an undue and discriminatory advantage over other marketers in connection with the interim transportation initiated in April 1986. This constituted a violation of the nondiscriminatory access provisions of Order No. 436, as contained in Section 284.9(b) of the Commission's regulations, 18 C.F.R. § 284.9(b). As such, it was also a violation of Sections 4(b) and 5(a) of the NGA, 15 U.S.C. §§ 717c(b) and 717d(a), since Order No. 436 was issued, *inter alia*, pursuant to those Sections. Since evidence was not presented, as discussed previously, that would allow a restitution remedy, it is appropriate to deal with this violation prospectively.

As a prospective remedy, Panhandle will be required, as a condition for permitting PTC to make further transportation arrangements on its system, to divorce itself from PTC on a corporate operational basis. In this regard, there is too much danger of Panhandle in the future discriminating by providing advance inside infor-

mation about its transportation activities to PTC, where the General Manager of PTC reports to the Senior Vice President in charge of the Marketing and T and E Departments of Panhandle. The PTC General Manager should not have access to weekly staff meetings involving the Panhandle Marketing and T and E Departments, but should be placed on an equal footing with any marketer seeking to make transportation arrangements on Panhandle. It is not warranted in this decision to rearrange the PTC and Panhandle corporate operating structures, so Panhandle will be directed to submit, within 30 days of the issuance of this decision, a plan for a corporate restructuring to ensure: (1) that PTC will be separate from Panhandle on an operational basis; and (2) that in the future PTC will not secure advance information or any other preference that will give PTC a competitive advantage regarding transportation on Panhandle's system.

Before leaving the marketing affiliate issue, it should be pointed out that the above ruling with regard to Panhandle and PTC is limited to their situation and should not be construed as any generic evaluation of the pipeline marketing affiliate situation. In this general context, it was brought out at hearing that the preponderance of gas marketers are affiliates of established natural gas pipeline entities. There are some 100 such marketers (Panhandle Ex. 21, p. 7; Tr. 540) and at present more than 40 of those marketers are active in transportation on Panhandle's system (Panhandle Ex. 21, p. 12). It was also established on the record that some of the major marketers are affiliated with LDCs (Panhandle Ex. 25; Tr. 531-32), and many more are affiliated with natural gas producers (Panhandle Ex. 23), with some 34 part of corporate producer entities. Moreover, the pipelines themselves are not in a position to control what marketer is used. The gas is produced and sold by producers, using the marketer they choose. Also, the Section 311 gas is purchased on behalf of LDCs and their end-users

who can select which marketer to use. Therefore, the pipeline marketing affiliate does not have any way of participating if the producer or purchaser decide otherwise, regardless of which pipeline is used as the transporter.

This is not to say, however, that a pipeline would be indifferent to the actions of its marketing affiliate. Since both the pipeline and the marketing affiliate are owned by the same corporate entity, the overall health of the parent corporation is enhanced by the success of the marketing affiliate. Necessarily, therefore, a pipeline is strengthened by having a profitable marketing affiliate since the overall corporate financial posture is healthier. It may well be that pipeline marketing affiliates do not have any particular advantage over producer or LDC affiliates, but the case at hand clearly shows that there are circumstances where a pipeline affiliate can secure an undue advantage over other marketers because of its relationship with the pipeline. It is this specific situation that must be remedied with regard to the Panhandle/PTC situation.

VI. The 7(c) Applications

These consolidated proceedings involve 12 separate applications by Panhandle to provide interruptible transportation service for varying terms for one or more shippers. These applications, as amended, involve 150 transportation agreements for combined maximum daily contract quantities of approximately 1.0 Bcf per day. The specific shippers include direct end-users, LDCs and the end-users they serve, producers, interstate and intrastate pipelines. In Panhandle Ex. 2, there is a list of each transaction showing pertinent detailed information, including: (1) the docket number, (2) the shipper/end-user, (3) the local distribution company, (4) the date of the agreement (as amended), (5) the maximum daily contract volume, and (6) an indication as to whether the points of receipt have been amended. The applications

contained in the 12 dockets are described in Panhandle Ex. 1, pp. 12-17, as follows:

In *Docket No. CP86-232* filed on December 12, 1985 Panhandle requested Section 7(c) authority to transport up to 67,000 Mcf/d on an interruptible basis for National Steel Corporation, an end-user, pursuant to a Transportation Agreement dated September 23, 1985 for a primary term ending September 23, 1987 and from year-to-year thereafter until September 23, 1990.

In *Docket No. CP86-486* filed on May 2, 1986 Panhandle requested Section 7(c) authority to transport on an interruptible basis up to 55,000 Mcf/d for Archer Daniels Midland Company, an end-user through Illinois Power Company, a local distribution company, pursuant to a Transportation Agreement dated February 5, 1986, as amended April 15, 1986 and June 9, 1986, for a term ending April 30, 1987, or thirty days following Panhandle's acceptance of an Order No. 436 blanket certificate.

In *Docket No. CP86-504* filed on May 20, 1986, as supplemented on June 16, 1986 and June 24, 1986, Panhandle requested Section 7(c) authority to continue interruptible transportation service of up to 185,250 Mcf/d for some thirty-nine (39) shippers who were previously being provided transportation service under authorizations received in Docket Nos. CP86-216, CP86-217, CP86-222, CP86-223, CP86-242, CP86-243, CP86-255 and CP86-256. Pursuant to amendments executed by the shippers, the term of the proposed service is through April 30, 1987 or thirty days following Panhandle's acceptance of an Order 436 blanket certificate. Five of these 39 shippers elected not to amend their agreements to extend the original term beyond October 31, 1986. Panhandle is therefore withdrawing its request for authori-

zation to transport for these five shippers which are identified on [Panhandle Exhibit No. 2].

In *Docket No. CP86-551* filed on June 11, 1986 Panhandle requested Section 7(c) authority to transport on an interruptible basis up to 3,000 Mcf/d for American Cyanamid Company, an end-user through Kansas Power and Light, a local distribution company, pursuant to a Transportation Agreement dated June 5, 1986 for a term ending June 5, 1988 or thirty days following Panhandle's acceptance of an Order No. 436 blanket certificate.

In *Docket No. CP86-573* filed on June 18, 1986, Panhandle requested Section 7(c) authority to continue interruptible transportation service of up to 529,058 Mcf/d for some ninety-two (92) shippers previously being provided transportation service pursuant to Section 311 for a term ending June 30, 1987 or thirty days following Panhandle's acceptance of an Order No. 436 blanket certificate. Two of the agreements were terminated by the shipper effective August 1, 1986. Panhandle is therefore withdrawing its request for authorization to transport for these two shippers which are identified on [Panhandle Exhibit No. 2].

In *Docket No. 86-598* filed on July 2, 1986, Panhandle requested Section 7(c) authority to transport on an interruptible basis up to 3,000 Mcf/d for Kansas Industrial Energy Supply Company, an unincorporated association of seven industrial end-users, pursuant to a Transportation Agreement dated June 25, 1986 for a term ending June 25, 1988 or thirty days following Panhandle's acceptance of an Order No. 436 blanket certificate.

In *Docket No. CP86-645* filed on July 31, 1986, Panhandle requested Section 7(c) authority to transport on an interruptible basis up to 45,000 Mcf/d of take-or-pay relief gas for Amoco Production Com-

pany, a producer, pusuant to a Transporation Agreement dated July 24, 1986 for a term of five years and month-to-month thereafter unless cancelled by either party.

In *Docket No. CP86-655* filed on August 6, 1986, Panhandle and Trunkline Gas Company jointly requested Section 7(c) authority to transport on an interruptible basis up to 10,000 Mcf/d for Tennessee Gas Pipeline Company, an interstate pipeline, pursuant to a Transportation Agreement dated May 30, 1986 for a term ending May 30, 1988 or thirty days following Panhandle's acceptance of an Order No. 436 Blanket certificate.

In *Docket No. CP86-660* filed on August 7, 1986, Panhandle requested Section 7(c) authority to transport on an interruptible basis up to 85,000 Mcf/d for Columbia Gas of Ohio, Inc., a local distribution company, pursuant to a Transportation Agreement dated May 16, 1986, for a primary term of five years and a sceecondary term not to exceed an additional five years.

In *Docket No. CP86-669* filed on August 13, 1986, Panhandle requested Section 7(c) authority to transport on an interruptible basis up to 20,100 Mcf/d for eight end-users behind four local distribution companies for a term ending two years from the date of the Transportation Agreements or thirty days following Panhandle's acceptance of an Order No. 436 blanket certificate.

In *Docket No. CP86-670* filed on August 13, 1986, Panhandle requested Section 7(c) authority to transport on an interruptible basis up to 6,000 Mcf/d for Cabot Corporation, an end-user through Kokomo Gas and Fuel Company, a local distribution company, pursuant to Transportation Agreement dated June 9, 1986 for a term ending June 9, 1988 or thirty

days following Panhandle's acceptance of an Order No. 436 blanket certificate.

And finally, in *Docket No. CP86-671* filed on August 13, 1986, Panhandle requested Section 7(c) authority to transport on an interruptible basis up to 5,200 Mcf/d for three end-use facilities of Carnation Company, through three local distribution companies, pursuant to three Transportation Agreements each dated on June 16, 1986 for a term ending June 16, 1988 or thirty days following Panhandle's acceptance of an Order No. 436 blanket certificate.

The Commission directed in the Hearing Order, 36 FERC at p. 61,701, that the Section 7(c) applications be reviewed to determine whether they demonstrate a pattern of undue discrimination by favoring a particular group of shippers, by treating similarly situated shippers differently, by favoring fuel switchable end-users or by denying shippers access to transportation in an unduly discriminatory manner. On this issue, a main argument raised against these applications is that they discriminate against the G rate customers by not allowing transportation for system supply of the G rate customers because of Panhandle's interpretation of Section 1.9 of its tariff. This argument has already been rejected in Section IV, *supra*, and need not be revisited at this juncture. However, other arguments relating to the 7(c) applications must be addressed.

CILCO has made specific protests against the application involving Citizens and against the application for service to Columbia Gas of Ohio. In addition, MichCon asserts that Panhandle failed to meet its burden of proof to establish that the services represented by the Section 7(c) applications are required by the present or future public convenience or necessity. MichCon also avers that Panhandle has not shown that the rates proposed for the applications are reasonable. Moreover, MichCon argues that the 7(c) applications represent a *de facto* blanket

transportation program so that the applications must either be denied or conditioned upon compliance with the non-discriminatory provisions of Order No. 436, particularly relating to contract conversion and reduction rights. These various arguments will now be addressed.

A. *Burden of Proof*

MichCon claims that Panhandle has not met its burden of proof to show that the twelve Section 7(c) applications will meet the present or future public convenience and necessity. MichCon submits that Panhandle has made no study of alternate transportation routes, that it did not have any estimate of the actual through-put associated with the proposed services and that it did not describe the economic benefits to be derived therefrom. MichCon's main reliance is on a Commission order in *ANR Pipeline Company*, 33 FERC ¶ 61,149, at p. 61,323 (1985), where the Commission held that the abbreviated Section 7(c) applications by ANR did not, by themselves, meet the affirmative obligation to support the requests for authorization because they did not demonstrate that the services proposed to be rendered, and the terms and conditions (including the rates) under which those services would be rendered, satisfy the standards of Section 7(c) of the NGA.

The case relied on by MichCon is, however, distinguishable since the Commission did not reject the applications therein but ordered them set for hearing, *id.* at p. 61,325. In the present case, there was extensive evidence and examination at hearing with regard to the applications and there is an adequate record for determining whether the applications meet the public convenience and necessity.

In this regard, the application for service to National Steel has previously been discussed in detail herein. As to the other applcations, it was established that Panhandle has the capacity available to provide these services

on an interruptible basis, that the shippers requested Panhandle to obtain the authorizations, that they want the services and that they have expressed support for the filings (Panhandle Ex. 8, p. 28-29; Panhandle Exs. 19 and 20; Tr. 593). Further, representative of the need for the transportation requests was the evidence from one LDC, Kokomo Gas & Fuel Company (Panhandle Ex. 6). Moreover, certain of the requests to transport involve transactions previously approved by the Commission. For example, the application in Docket No. CP86-504-000 includes requests for expired transportation services previously approved in Docket No. CP86-216-000, *et al.*, 35 FERC ¶ 61,146 (1986). Further, many of the applications are specifically designed to retain industrial loads with fuel-switching capability, in an effort to meet competition from oil. In those instances, the LDCs involved would benefit from receiving transportation revenues they would otherwise lose. Similarly, Panhandle will benefit from transportation revenues and that eventually will aid its other customers by helping to avoid rate increases and by being factored into Panhandle's next rate case.

In addition, it was shown that the Columbia Gas of Ohio (Columbia Gas) application was specifically meant to implement an approved program of the Public Utility Commission of Ohio, which is intended to afford Columbia Gas with another flexible source of supply and with lower prices which would benefit its customers. This situation highlights the point that the applications should be considered in light of the current regulatory policy relating to transportation in the gas industry. This policy is embodied in Order No. 436 and seeks to foster competition by the use of flexible and non-discriminatory transportation. These applications of interruptible transportation service are consistent with the Commission's interest in promoting flexibility and competition and, as such, must be considered as meeting the public convenience and

necessity. Indeed, the standard for assessing these applications might be more strict were they for permanent services but, in view of their interruptible nature, it must be concluded that Panhandle has met its burden of proving that the applications meet the public convenience and necessity.

B. *The Rates for the Applications*

In this area, MichCon criticizes the use in the applications of the PT rate schedule on the basis that Panhandle has not offered sufficient supporting evidence to show that that rate schedule is just and reasonable. Another attack on the PT rate involves the allegation that it is discriminatory since it is less than the rate available to MichCon under the SS-1 rate schedule. This latter argument has been previously discussed in connection with the by-pass issue, Section III, *supra*, and has been rejected since the rates involved are for disparate services.

Nor are MichCon's arguments regarding the lack of support for the PT rate persuasive. It was established that the PT rates are fully allocated, 100% load factor rates based on a representative level of transportation (Panhandle Ex. 8, p. 27; Tr. 2115). Moreover, the PT rates are founded upon a filed rate schedule which is approved, albeit conditionally, and in effect pursuant to Commission orders issued in Docket No. RP86-116-000. It is also the transportation rate schedule for transportation services required by Section 284.7 of the Commission's Regulations, 18 C.F.R. § 284.7. Therefore, the proposed rates are acceptable for the purposes of determining whether the Section 7(c) authorizations should be granted. Evaluation of a Section 7(c) application does not require a determination under the stricter just and reasonable standard of Section 4 of the NGA. The authorizations that will be granted for the 7(c) applica-

tions will, though, be made conditional upon the outcome of the proceeding involving the PT rate schedule. In any event, sufficient evidence has been presented regarding the PT rate schedule to satisfy the Section 7(c) proceedings and, under the circumstances, it would be a waste of the Commission's and the parties' time and resources to duplicate the evaluation of the PT rate schedule that is involved in Docket No. RP86-116-000.

C. *Citizens Gas and Coke Utility*

CILCO objects to Panhandle's proposed transportation for Citizens Gas & Coke Utility (Citizens) as an example of discrimination in that that application would provide transportation for system supply for Citizens who is, like CILCO, a G rate customer of Panhandle (CILCO Initial Brief, p. 26). The Citizens' request is contained in Docket No. CP86-504-000, where Panhandle seeks authority to continue interruptible transportation services of up to 185,250 Mcf per day for some 39 shippers, who had previously been provided transportation service under authorizations received in Docket Nos. CP86-216, CP86-217, CP86-222, CP86-223, CP86-242, CP86-243, CP86-255, and CP86-256 (Panhandle Ex. 1, p. 13). The transportation originating in Docket No. CP86-243 is the transportation involving Citizens and Panhandle seeks herein to extend that authorization. In Docket No. CP86-243, 35 FERC ¶ 61,138 (1986), the Commission had granted Panhandle its request to transport up to 5500 Mcf per day on behalf of Citizens. While CILCO complains about the Citizens transaction as an example of discrimination, it does not oppose granting the requested transportation (Tr. 955, 1150).

Moreover, the following facts relating to the Citizens transportation are pertinent. During the late 1970's, because of the nationwide deliverability shortfall in the interstate natural gas industry, Panhandle was unable to supply the contract demand level to Citizens which Citi-

zens had requested. In direct response to that situation, Citizens instituted a self-help program which involved the creation of a subsidiary, Citizens Resource Development Corporation (CRDC), a natural gas exploration production and development company whose activities are funded by Citizens' rate payers. The current application involves gas obtained by CRDC as a remnant of the self-help activity Citizens was forced to undertake in 1978. (Panhandle Ex. 8, p. 30.) Further, Citizens' actions in securing this source of supply are not contrary to the provisions of Section 1.9 of Panhandle's tariff because they fall within the "unable to supply" exception (Panhandle Ex. 8, p. 31).

While there has been much discussion of Section 1.9 of Panhandle's tariff, no argument has been advanced that the exception permitting gas to be transported for system supply, where Panhandle has been unable to supply a requested contract demand, is unreasonable. Accordingly, this particular transportation is justified because it falls within that exception as shown by the facts set out above. In 1978, Panhandle could not supply Citizens' contract demand request so Citizens spent its own money to secure an alternate source of supply. At that time, CILCO could also have used the exception and embarked on a self-funded program to secure its own supply but it elected not to do so. Under these circumstances, it must be concluded that the transportation by Panhandle to Citizens for system supply is not unduly discriminatory and that the Section 7(c) application involving Citizens meets the public convenience and necessity.

D. *Columbia Gas of Ohio*

CILCO urges that Panhandle's application in Docket No. CI86-660-000 to provide transportation service to Columbia Gas should be limited to 30,000 Mcf per day and be restricted to a shorter term because the proposed

service cannot be shown to be presently or prospectively necessary. CILCO takes the position that Columbia Gas has no demonstrable present or future market needs for 85,000 Mcf per day and that the 85,000 figure corresponds not to Columbia Gas' market requirements but to its physical capacity to receive the gas. Allegedly the maximum potential market need for the proposed services would be 30,000 Mcf per day. (CILCO Initial Brief at p. 35.) According to CILCO, the reason for requesting 85,000 Mcf per day is to enable Columbia Gas to reserve a high priority claim among interruptible service customers for capacity on Panhandle's system (Tr. 2381-82). CILCO alleges that, by contracting for excess capacity in the absence of a demonstrable need, the proposed transportation for Columbia Gas could prejudice system supply transportation for G rate customers for years since the proposed transportation has a primary term of five years and a supplemental term of an additional five years. CILCO also argues that the capacity to be dedicated to Columbia Gas under the application at issue could adversely affect interruptible transportation to the end-users on captive distribution systems. (CILCO Initial Brief, pp. 34-36).

Columbia Gas Transmission Corporation, who is the primary supplier of Columbia Gas, also opposes the Section 7(c) application on the basis that Panhandle should not be permitted to enter into long-term transportation arrangements with off-system customers, unless it grants similar requests to all of its customers and fully opens its system on a permanent basis pursuant to Order No. 436 (Columbia Gas Transmission Corporation Initial Brief, p. 4).

At the outset, it is appropriate to describe the transportation service requested. Panhandle seeks to transport up to 85,000 Mcf of gas per day on an interruptible basis for Columbia Gas. Panhandle also seeks authority to construct and operate a new point of interconnection with Columbia Gas at Maumee, Ohio. Panhandle will re-

ceive volumes of gas belonging to Columbia Gas at 26 existing points of interconnection and redeliver the gas to the new Maumee interconnection, which is estimated to cost $1,080,000, for which Columbia Gas will reimburse Panhandle. The proposed term of service is for a primary term of five years, with an optional secondary term not to exceed five years. (Columbia Gas Initial Brief, pp. 1-2; Col. Gas Ex. 1.) The site of the connection is near Toledo, Ohio, the second largest service area supoprted by Columbia Gas (Col. Gas Ex. 1, p. 3).

Regarding the basic objections by CILCO, Columbia Gas Transmission and MichCon to this particular application, they again all fall within the scope of the basic complaint by CILCO that Panhandle will not transport gas for system supply for its G rate customers because of the Section 1.9 tariff interpretation. Since this contention has already been resolved in Section IV, *supra*, this argument is no barrier to granting the application for transportation for Columbia Gas.

Moreover, Columbia Gas has made an adequate showing that these transportation arrangements are in the public interest. CILCO's protestations and the evaluation by its witness that the amount of transportation sought by Columbia Gas of Ohio is excessive, are not borne out by the more credible evidence. Although the facilities requested by Columbia Gas are, at the present time, in part dedicated to an exchange station function with East Ohio Gas for Ohio-produced self-help gas (CILCO Ex. 15), Ohio industries are presently using less expensive southwest gas in lieu of that Ohio-produced gas (Tr. 837-38). Therefore, there is currently more than sufficient capacity at three other East Ohio exchange stations to free up the entire 85,000 Mcf per day capacity of the proposed facilities and to deliver that entire amount into the Columbia Gas market. Further, Columbia Gas can fully use that amount this winter and the moderate betterments of Columbia Gas facilities scheduled for the

summer of 1987 will enable utilization of the full 85,000 Mcf per day even in the summer period (Tr. 838-40).

Further, the granting of this application is consistent with the policy of the Public Utilities Commission of Ohio (PUCO). On October 8, 1985, PUCO concluded that the purchasing practices of Columbia Gas were imprudent and ordered Columbia Gas to pursue further an alternate source of supply (Col. Gas Ex. 1, pp. 7-8; CG Exhibit 3, p. 29). Accordingly, Columbia Gas contacted Panhandle to gain access to new sources of supply (CILCO Ex. 13, p. 1). As a result of this application, Columbia Gas will be able to expand its available sources of supply in a manner consistent with PUCO policy (Col. Gas Ex. 1, p. 3).

Additionally, the proposal has the potential for eliminating unnecessary costs. Columbia Gas is now required to pay transportation charges to Columbia Gas Transmission Corporation for transporting gas from Panhandle (Col. Gas Ex. 1, p. 6). Those fees could be avoided by approval of the current application. Also, the provision of interruptible service is an opportunity for Columbia Gas to displace higher priced contract gas, a result in keeping with the PUCO policy of low-cost pricing (Col. Gas Ex. 1, p. 7).

Columbia Gas also notes that its present supplier, Columbia Gas Transmission Corporation, has accepted a blanket certificate pursuant to Order No. 436. As a result, Columbia Gas has contract demand reduction and conversion rights. By exercising those rights and by requesting the present service from Panhandle, Columbia Gas seeks to obtain access to gas supplies not previously available to it. Columbia Gas correctly argues that access to a broad variety of supply sources, competition for gas and the ability to move such gas to market are important considerations of Order No. 436 (Columbia Gas Initial Brief, p. 10). The application for Columbia Gas, therefore, comports with the dictates of Order No. 436.

It must be concluded, based upon the above review, that it has been demonstrated that the application for transportation service to Columbia Gas meets the public convenience and necessity standard of Section 7(c) of the NGA and should be granted.

However, there remains one area of concern that must be considered relating to this application. This is the effect that the application might have on capacity priorities, and involves a question as to the length of the term of the proposed service. Under the current operation of transportation by Panhandle, no priority problem will be created by this application since it will become part of the first-come, first-served priority queue for interruptible transportation.

However, Panhandle has yet to become an open access transporter pursuant to Order No. 436, although its application is on file with the Commission. If G rate customers, such as CILCO, elect to retain the benefits of the general service customer class, they will be unable to transport for system supply until an Order No. 436 blanket certificate is accepted by Panhandle. It is very probable, therefore, that the G rate customers would be faced with a lower priority than Columbia Gas, if and when Panhandle secures the blanket authority under Order No. 436. However, it seems equitable to place to the G rate and SG rate customers who may wish interruptible transportation service when Panhandle secures Order No. 436 blanket authority, on an equal priority basis with an off-system customer such as Columbia Gas. Most of the other applications contain a condition that the authority will terminate within 30 days after the Order No. 436 certificate authority has been accepted by Panhandle. This condition appears to be a reasonable and equitable approach to avoid future controversy over capacity priorities if Panhandle accepts the Order No. 436 blanket certificate. Therefore, the granting of this certificate is going to be specifically conditioned, as are

the other certificates, on the authority to transport terminatng 30 days following Panhandle's acceptance of an Order No. 436 blanket certificate.

The above discussion relating to conditioning the Columbia Gas certificate is equally applicable to the National Steel application, where the transportation authority is sought for a term ending September 23, 1987 and on a year-to-year basis thereafter until September 23, 1990. Therefore, the Section 7(c) application that is being granted for transportation by Panhandle to National Steel will likewise be conditioned so that the authority will terminate 30 days following Panhandle's acceptance of an Order No. 436 blanket certificate. Also, the application in Docket No. CP86-645-000 to transport gas to Amoco is for a term of 5 years followed by month-to-month service thereafter. Therefore, the same condition will be entered for that transportation. This will put all the interruptible transportation involved herein on an equal footing and will eliminate any undue capacity priority advantages when Panhandle becomes an open access transporter under Order No. 436.

E. The Section 7(c) Applications as Demonstrating a Pattern of Undue Discrimination

Based on the Commission's charge that the Section 7(c) applications be analyzed to see whether they demonstrate a pattern of undue discrimination, MichCon asserts that the applications constitute a *de facto* blanket program and must either be denied or conditioned to comply with the nondiscriminatory provisions of Order No. 436. In this regard, MichCon seeks either minimum bill crediting or contract demand conversion and reduction rights in connection with the granting of the applications. The discussions relating to the National Steel by-pass issue in Section III, *supra*, have already covered the minimum bill crediting request by MichCon. As noted in Section III above, this appears to be unnecessary

since the minimum bill relating to MichCon's service under the SST rate has been eliminated, an action that will probably be upheld in light of the recent Commission decision on minimum bills in *ANR Pipeline Company*, 37 FERC ¶ 61,263, slip op. at 45 (December 19, 1986).

While it is correct that the 7(c) applications are, with three exceptions, due to expire after Panhandle accepts an Order No. 436 blanket certificate and that the transportation involved is then intended to be performed under the blanket authorization (Tr. 789), it cannot be said that the applications themselves constitute a blanket program. Although the applications involve 150 transportation agreements for a combined maximum daily contract quantity of approximately 1 Bcf per day, they do not represent the entire universe of transportation being performed by Panhandle. In addition to the grandfathered transportation for high priority end-users, there is the transportation that is being performed under the interim Section 311 authority that began in April 1986 and will continue under the current waiver until April 30, 1987. Further, transportation is also flowing on Panhandle under previously approved Section 7(c) authorizations. The record shows that Panhandle is providing transportation services under some 1,200 contracts for distributors, interstate pipelines, intrastate pipelines and end-users (Panhandle Ex. 8, p. 20). In view of this, the 12 applications that are at issue herein represent merely a part of Panhandle's overall transportation activities.

Further, it was brought out that the 12 applications do not conform to any pattern either geographically or with regard to the producers and purchasers involved. It appears that the Section 7(c) applications were filed merely based upon when they were chronologically received by Panhandle. A brief description of recent Panhandle activities confirms this.

In mid-November 1985, Panhandle began receiving requests from end-users who had previously been trans-

porting under the self-implementing programs that expired October 31, 1985 and who can generally be described as low-priority end-users. As those requests came in, Panhandle proceeded to process them and filed Section 7(c) applications for them sometime between December 1985 and January 1986. Those certificates were granted in late April or early May of 1986 and service was performed under those certificates through the end of June 1986. Also, the interim Section 311 service began in April 1986 but that too was then scheduled to expire by the end of June 1986. So the shippers that had already been approved by the Commission requested Panhandle to file other Section 7(c) applications to take the service beyond June 30, 1986. This accounts for the two applications included herein which are primarily for low priority end-users. In addition, during late 1985 and early 1986, Panhandle was receiving new requests to provide transportation service and, as those requests were received, Section 7(c) applications were filed. The first of these was the National Steel application in December 1985. What transpired was that, when a request came in and a transportation contract was executed, Panhandle would file the Section 7(c) applications. (Tr. 802-805.) Further, there are certain Panhandle Section 7(c) applications filed but not consolidated herein and other currently being processed by Panhandle, but these too have no discernible pattern other than the chronological order of receipt by Panhandle (Tr. 807).

Contrary to MichCon's assertions, the 12 applications at issue here do not constitute a *de facto* blanket transportation program, but are merely, as Panhandle correctly claims, an effort by Panhandle to provide transportation on a non-discriminatory basis while it awaits processing of its application for an Order No. 436 blanket certificate. In effect, MichCon is attempting to force Panhandle to accept all the conditions of an Order No. 436 certificate in connection with the transportation applications herein.

However, the use of the Section 7(c) certificate procedures is specifically set out to be an alternative to employment of Order No. 436 blanket authority. There is nothing mandatory or obligatory with respect to the Order No. 436 program, which is strictly a voluntary option for a pipeline. The Commission in Order No. 436 made clear that a pipeline remains free to provide Order No. 436 services or instead to provide other services not subject to the contract demand reduction and conversion rights, such as transportation or sales service under an individual certificate pursuant to Section 7(c) of the NGA, Order No. 436-A at p. 31,642. Moreover, the Commission noted in Order No. 436-A at p. 31,643, that it had the resources to process the currently pending Section 7(c) applications and also had adequate flexibility within its overall resources to respond to such future filings. Panhandle correctly submits that what it has done in filing the Section 7(c) applications involved herein, is what the Commission anticipated with respect to those pipelines that have not as yet obtained blanket Order No. 436 certificates.

Moreover, the random nature of the filings and the fact that they cover direct end-users, LDCs and the end-users the LDCs serve, producers, interstate and intrastate pipelines is evidence that there is no pattern of discrimination in connection with the applications. The record establishes that the applications were filed merely as a result of random receipt by Panhandle of requests for transportation. There is nothing to indicate that the applications favor any particular group of shippers, that they treat similarly situated shippers differently, that they favor fuel-switchable end-users (in this regard, it should be pointed out that the Citizens and Columbia Gas of Ohio applications are for system supply) or that they deny any shipper access to transportation in an unduly discriminatory manner. On this last item, it should be particularly noted that the resolution of the Section 1.9 tariff issue in Section IV, *supra*, is directly in point.

Another matter can logically be treated in considering of whether the applications consttiute a *de facto* blanket transportation program. IPAMS raised issues regarding the Order No. 436 blanket certificate application which is being considered by the Commission in Docket No. CP86-585-000. The determinations regarding Panhandle's Order No. 436 blanket certificate application are matters that will be properly decided in the docket covering that application and it is inappropriate to air controversies relating to the terms of that blanket certificate program in this cause. What is at issue here is whether Panhandle has provided non-discriminatory transportation under the interim Section 311 program initiated in April 1986 and under the Section 7(c) certificates applied for herein. Panhandle's current transportation policies are also at issue, but this does not warrant a review of what those polices will be in the future, if and when Panhandle gets a blanket certificate under Order No. 436. This is particularly true when to do so would be duplicative of the Commission's efforts currently underway in Docket No. CP86-585-000.

In a similar vein, the Illinois Commerce Commission (ICC) proposes that a condition be imposed, pursuant to Section 7(c) of the NGA, on the granting of the twelve Section 7(c) applications that would require Panhandle to file a fully elaborated set of transportation operating terms and conditions similar in form, content, organization and application, to that filed by Panhandle as pages 19 through 66 of Exhibit P in Docket No. CP86-585-000 (ICC Initial Brief, pp. 4, 5). As noted above, Docket No. CP86-585-000 involves Panhandle's application for a blanket transportation certificate under Order No. 436 and is not consolidated herein. ICC presented no evidence in the instant proceeding and the Exhibit P it relies on is not part of the record in this cause. Therefore, the parties had no opportunity to address at hearing this unique and far-reaching ICC proposal, which is based on material outside the record. As a result, ICC's proposal

must be rejected because it does not have proper record support and because it would be unfair to adopt it without the parties having had the opportunity to address it at hearing.

F. Impact of the Southern case

Part of the issues set for hearing was the direction by the Commission to inquire whether Panhandle's transportation policies had been or currently are unduly discriminatory. This led to extensive evidence and examination regarding Panhandle's transportation activities. Panhandle attempted to summarize its position as follows (Panhandle Initial Brief, pp. 55-57):

> Simply stated, Panhandle will transport natural gas for any shipper—including local distribution companies, interstate or intrastate pipelines, customers of interstate or intrastate pipelines and local distribution companies, producers, marketers, and end-users—pursuant to the terms of the applicable transportation tariffs and rate schedules and upon the execution of the appropriate contractual arrangements. Of course, transportation is subject to the availability of capacity and similar operational considerations. Transportation will be provided under (1) self-implementing arrangements that have been "grandfathered" under the terms of Order No. 436 and the clarifications thereto, (2) individually certificated transportation arrangements, or (3) Section 311 of intrastate pipelines (as defined in Order No. 436) during the "interim" or "waiver" period now extending through no later than January 1, 1987. Panhandle Exh. 1, pages 6-7. Panhandle Exhibit No. 4 is a copy of Mr. Bray's letter of March 13, 1986 concerning several of the dockets later consolidated into this proceeding. There the Company stated that:
>
> [U]pon execution of appropriate contractual arrangements, Panhandle will seek authority pursuant

> to the Section 7(c) of the Natural Gas Act to transport gas for any shipper requesting transportation service.
>
> This has been Panhandle's policy during the entire period under review here, as shown in part by the numerous applications by Panhandle for transportation authority th at are part of this case. Further, Panhandle began providing new interim 311 transportation on April 24, 1986 and that additional form of transportation service has been offered and performed on an open, non-discriminatory basis for any shipper. Panhandle Ex. 1, pages 8-9.

With regard to Panhandle's transportation policies, certain requirements set by the Commission in *Southern Natural Gas Company*, 36 FERC ¶ 61,275 (1986), appear to be pertinent. In *Southern*, the Commission considered that pipeline's transportation policy, so that case is in point because the Commission in this cause has placed Panhandle's transportation policies at issue. A review of Panhandle's description of its transportation policy, which is set out above, shows that it is not nearly as well-defined as the statement policy required in *Southern, id.* at pp. 61,681-82. For example, the Panhandle statement does not contain specific conditions for access, or queuing and curtailment rules. Moreover, the Commission in *Southern* required that Southern maintain a detailed log of requests for transportation service and their disposition. While Panhandle does keep a log of its transportation requests (Panhandle Ex. 54, p. 70), details regarding this log were not set out in the record. Under the circumstances, it is warranted to follow the Commission precedent and make the statement of policy and logging requirements in *Southern, id.* at pp. 61,681-82, applicable to Panhandle. Therefore, Panhandle will be directed, as a condition to the granting of the Section 7(c) applications herein, to file with the Commission within 30 days a statement of policy meeting the *South-*

ern criteria, and will also be directed to maintain a detailed transportation log as described in *Southern.*

Also, in *Southern, id.* at p. 61,681, the Commission denied authorization for flexible receipt points for the *Southern* applications and in effect gave Southern 120 days to add specific receipt points. In line with this ruling in *Southern,* the Section 7(c) applications of Panhandle being granted in this initial decision will be conditioned upon the deletion of flexible receipt points in the applications and Panhandle will be required to file, within 30 days, additional specific receipt points for the various applications. The time is being limited to 30 days, rather than 120, since the authority issued in certain of the applications would expire before 120 days has elapsed.

VII. Findings and Conclusions

Based on the evidence of record and on the analyses, rulings and determinations in the initial decision, the following findings and conclusions can be entered:

1. Panhandle's application in Docket No. CP86-232-000 for transportation to National Steel will by-pass any sales of gas by MichCon to National Steel and will by-pass the gas transportation services MichCon is currently providing to National Steel by displacing those transportation arrangements.

2. Based on an evaluation of the overall benefits to National Steel, to Panhandle and its customers, to the communities near National Steel's plants and to the public interest by fostering competition, versus the potential detriments to MichCon and its other customers from the Panhandle proposal to serve National Steel, it must be concluded that the benefits outweigh the potential detriments and that the proposal will serve the public interest. Therefore, granting of the application in Docket No. CP86-232-000 is required by the public convenience and necessity.

3. The potential detriments to MichCon and its customers will occur regardless of whether the application in Docket No. CP86-232-000 is granted because National Steel has a viable other supply option, the underwater pipeline, which it will be able to use in the near future and which is more attractive financially to National Steel than its current gas transportation arrangements with MichCon.

4. Any potential detriment to MichCon's other customers from granting of the application in Docket No. CP86-232-000 is speculative since MichCon would not file for a rate increase with the Michigan Public Service Commission solely because of the loss of National Steel's load.

5. Panhandle's interpretation of Sections 1.8 and 1.9 of its tariff to preclude its full requirements SG rate and G rate customers from transporting gas for system supply unless those customers become partial requirements LS rate customers, is reasonable and nondiscriminatory. Therefore, Panhandle has not refused to transport gas for system supply for its SG and G rate customers but will provide such transportation upon its reasonable precondition concerning customer class status having been met.

6. Panhandle has not used its marketing affiliate PTC to monopolize spot market transactions on its system because the spot market, by its nature, is not susceptible to dominance or monopolization by any one marketer.

7. Panhandle was responsible for PTC having advance knowledge of Panhandle's opening for interim Section 311 transportation on April 21, 1986, which, together with the PTC/Panhandle operating relationship, allowed PTC to gain a short-term advantage over other marketers in connection with that transportation. Therefore, Panhandle gave PTC an undue preference over other marketers in violation of Section 284.9(b) of the Commission's regulations, 18 C.F.R. § 284.9(b), which was

promulgated pursuant to Order No. 436. Accordingly, this undue preference was in violation of Order No. 436, which was issued pursuant to, *inter alia*, Sections 4 and 5 of the NGA, 15 U.S.C. §§ 717c and 717d. As a result, the above described undue preference is in violation of Sections 4(b) and 5(a) of the NGA, 15 U.S.C. §§ 717c (b) and 717d(a).

8. It was not established on the record that any marketer or other entity involved sustained any specific damages from the undue preference accorded PTC by Panhandle that is described in Finding 7 above. Therefore, it is not possible to provide a remedy by way of restitution. However, a prospective remedy ordering Panhandle to restructure its corporate management to sever its operational ties with PTC is appropriate and will be entered to prevent any future undue preferences.

9. Except for the undue preference described in Finding 7 above, Panhandle's other actions in connection with the cessation of interruptible transportation on November 1, 1985, the opening and implementation of interim Section 311 transportation in April 1986, the use of the exchange agreement with CIG and the curtailment of interruptible transportation on December 1, 1986, were reasonable and nondiscriminatory.

10. Panhandle's twelve Section 7(c) applications at issue herein do not demonstrate a pattern of undue discrimination by favoring a particular group of shippers, by treating similarly situated shippers differently, by favoring fuel-switchable end-users or by denying shippers access to transportation in an unduly discriminatory manner.

11. It was established on the record that the granting of the twelve Section 7(c) applications by Panhandle, as conditioned herein, is required by the public convenience and necessity. Therefore, the applications must be granted.

12. The public convenience and necessity, and the Commission decision in Southern Natural Gas Company, 36 FERC ¶ 61,275 (1986), requires that the certificate authority given Panhandle by granting the twelve Section 7(c) applications be conditioned: (1) to provide that use of the PT rate schedule will be conformed to the outcome of Docket No. RP86-116-000, where the Commission has under review the justness and reasonableness of the PT rate; (2) to provide, in the alternative to the specific terms, that the authority granted in Docket Nos. CP86-232-000, CP86-645-000 and CP86-660-000, terminate 30 days following Panhandle's acceptance of an Order No. 436 blanket certificate; (3) to require the deletion of flexible receipt points; (4) to require Panhandle to file a more comprehensive statement of transportation policy; and (5) to require Panhandle to keep a detailed log of transportation requests and their disposition.

13. Except as set out in Finding 7 above, Panhandle's transportation policies have not been, nor are they currently, unduly discriminatory.

14. Except as set out in Finding 7 above, Panhandle has not engaged in any anticompetitive behavior that is unduly discriminatory under the NGA.

VIII. Conditions

Based on the evidence of record, and on the analyses, rulings, determinations, findings and conclusions in this initial decision, the following conditions are imposed, pursuant to Section 7(e) of the NGA, 15 U.S.C. § 717f(e), on the issuance of the certificate authority to Panhandle from the granting of the twelve Section 7(c) transportation applications:

1. Use of the PT rate schedule for the twelve Section 7(c) applications involved herein will be conformed to the outcome of the Commission's resolution of Docket No. RP86-116-000, where the Commission has under review the justness and reasonableness of the PT rate.

2. As an alternative to the specific length of the terms for service provided for in Docket Nos. CP86-232-000, CP86-645-000 and CP86-660-000, the respective certificates issued in those dockets shall terminate 30 days following Panhandle's acceptance of an Order No. 436 blanket certificate.

3. Any flexible receipt points provided for in the twelve Section 7(c) applications shall be deleted and Panhandle shall file, within 30 days, additional specific receipt points for the applications involved.

4. Within 30 days of the date of this order, Panhandle shall submit to the Commission a statement of its policy in providing transportation service and specifically whether it is willing to offer transportation on a nondiscriminatory basis to all pipelines, end-users, producers, brokers, marketers, and other potential shippers who request such service. The statement also shall include the conditions for access, such as the service and/or shippers for which the pipeline will or will not file for section 7(c) authority, any minimum or maximum duration or volumes, minimum credit standards, and any queuing and curtailment rules in the event of inadequate firm or interruptible capacity. The policy shall be set out in sufficient detail to allow a comparison of the policy with the pipeline's practices as evidenced by the log required below, and other circumstances. Panhandle shall submit to the Commission any revisions to its statements of policy within 10 days of any such revisions.

5. The certificates being granted as a result of the Section 7(c) applications herein, are each subject to the condition that Panhandle maintain a log of requests for transportation service and their disposition. Such a log shall be kept current and shall be made available to members of the public upon request during business hours at Panhandle's place of business. Such log shall include information regarding the date of all transportation requests; the identity of the shipper making the

request; the volumes, duration, and sources of the gas; receipt and delivery points of the gas to be transported; whether the service requested is interruptible or firm; the identity of the ultimate end-user of the gas; the rates requested for such service and whether or not the gas transported is subject to take-or-pay relief; the disposition of the request by Panhandle; date and an explanation of the disposition of the request; and any complaints by the shipper or end-user concerning the requested or furnished service.

IX. Order

Based on the evidence of record and on the analyses, rulings, determinations, findings and conclusions in this decision, it is ordered that Panhandle file, within 30 days of the issuance of this decision, a plan for corporate restructuring of Panhandle and PTC to ensure: (1) that PTC will be totally separate from Panhandle on an operational basis; and (2) that in the future PTC will not secure any advance information or any other preference that will give PTC a competitive advantage regarding transportation on Panhandle's system.

It is further ordered that certificates of public convenience and necessity be issued to Panhandle, pursuant to Section 7(c) of the NGA, 15 U.S.C. § 717f(c), authorizing the transportation requested in the twelve Section 7(c) applications involved in this proceeding, provided, however, that Panhandle comply with the conditions set forth in Section VIII, *supra*.

The action taken in this initial decision is subject to review by the Commission on appeal or on its own motion, as provided for in Rules 711 and 712 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.711 and 385.712. The Commission did, however, in the Hearing Order, 36 FERC at p. 61,702, specify that briefs on exception shall be filed no later than 15 days after issuance of this decision, and that briefs opposing exceptions shall be filed no later than 15 days thereafter.

STATUTORY PROVISIONS

Natural Gas Act

Section 1, 15 U.S.C. § 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest. As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of 15 USCS §§ 717 et seq. applicable. The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intra-state transactions exempt from provisions of 15 USCS §§ 717 et seq.; certification from state commission as conclusive evidence. The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another

person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Section 7(c), 15 U.S.C. § 717(c)(1)(A)

No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act.

Pending the determination of any such application, the continuance of such operation shall be lawful.

Michigan Act 69

MCL 460.501. Definitions. SEC. 1. The term "municipality", when used in this act, means a city, village or township.

The term "public utility", when used in this act, means persons and corporations, other than municipal corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation.

The term "commission", when used in this act, means the Michigan public utilities commission or such other state governmental agency as may exercise the powers now conferred upon said commission. (MCL § 460.501; CL '29, § 11087.)

MCL 460.502. Certificate of convenience and necessity, when required. SEC. 2. No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension. (MCL § 460.502; CL '29, § 11088.)

No. 89-1161

Supreme Court, U.S.
FILED
MAR 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MICHIGAN AND
MICHIGAN PUBLIC SERVICE COMMISSION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT NATIONAL STEEL CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission exceeded its jurisdiction under Section 1(b) of the Natural Gas Act regarding transportation of natural gas in interstate commerce and companies which perform such transportation by granting a certificate of public convenience and necessity that authorizes an interstate pipeline to transport user-owned natural gas from Oklahoma to the user's plant in Michigan and to construct limited pipeline facilities to perform the interstate transportation service.

IDENTITY OF AFFILIATES

National Steel Corporation is a Delaware Corporation. It is jointly owned by two parent entities, NII Capital Corporation and NKK U.S.A. Corporation. These corporations are not publicly traded but are subsidiaries of the publicly traded corporations, National Intergroup, Inc. and NKK Corporation. National Steel Corporation has the following subsidiaries owned jointly with others, none of which is publicly traded:

Buffalo River Improvement Corporation
Concast Holding A.G.
Iron Ore Company of Canada
Iron Ore Land Company
Mathies Coal Company
The Messaba-Cliffs Mining Company
Pilot Knob Pellet Company
Presque Isle Corporation
ProCoil Corporation
Taylor Devices, Inc.

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BRIEF OF RESPONDENT NATIONAL STEEL CORPORATION IN OPPOSITION

STATEMENT OF THE CASE

This case involves the authority of the Federal Energy Regulatory Commission ("FERC" or "Commission") over interstate transportation of natural gas. Specifically, Petitioners challenge the Commission's jurisdiction to issue, pursuant to Sections 1(b) and 7(c) of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717(b) and 717f(c) (1988), a certificate of public convenience and neces-

sity authorizing Panhandle Eastern Pipe Line Company ("Panhandle") (1) to transport natural gas owned by National Steel Corporation ("National") from Oklahoma to National's steel plant in Michigan, and (2) to construct and operate pipeline facilities needed to accomplish the transportation service. The two pipeline taps and meters authorized to be constructed are located on Panhandle's main transmission line at a point that is on National's plant property. The deliveries are made directly to National at high pressure from Panhandle's transmission line, which runs from Oklahoma to Canada across National's steel mill property.

The Commission granted Panhandle's requested certificate of public convenience and necessity based upon a full record consisting of extensive public hearings and briefing in which interested parties were able to present evidence and arguments concerning all factors affecting the public interest. Petitioners, Michigan and the Michigan Public Service Commission ("Michigan"), participated in those proceedings as did Panhandle, National, Michigan Consolidated Gas Company ("MichCon"), other local distribution companies served by Panhandle, and the FERC staff.

As recognized by the Commission, Panhandle's service to National is pure interstate transportation for hire; Panhandle makes no sales whatsoever to National. (*Panhandle Eastern Pipe Line Co.*, 38 FERC (CCH) ¶ 63,009 at 65,041 (1987), Appendix at 124a-125a.)[1] Rather, National owns the gas to be transported (a) prior to delivery to Panhandle, (b) at all times it is in the possession of Panhandle, and (c) at the time of redelivery to National's plant where it is used by National. As found by the Commission:

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[1] References to the "Appendix" or "App." are to the Appendix to Michigan's Petition for Writ of Certiorari.

> [This case] involves natural gas that is purchased by National Steel in Oklahoma and transported by Panhandle to Michigan. The gas, therefore, will be moving in interstate commerce as defined by the NGA. Because our jurisdiction extends over the transportation of gas to be delivered to end-users, Panhandle's transportation service is subject to our jurisdiction. Furthermore, once we find the proposed transportation to be in interstate commerce, section 7(c) of the NGA requires the pipeline to obtain from us a certificate of public convenience and necessity authorizing such transportation.

(*Panhandle Eastern Pipe Line Co.*, 42 FERC (CCH) ¶ 61,076 at 61,347 (1988), App. at 49a (footnotes omitted).)

The Commission rejected Michigan's contention that Panhandle's interstate transportation of user-owned gas directly to National is "local distribution" beyond FERC's authority. (42 FERC at 61,347-349, App. at 50a-55a.)[2] Furthermore, the Commission rejected Michigan's contention that the "local distribution" exemption empowers states to veto the Commission's interstate transportation orders. (42 FERC at 61,349, App. at 54a-55a.) It wrote:

> State commissions remain free to regulate the rates and review the purchasing practices of distributors under their jurisdiction. If State commissions had authority to frustrate individual pipeline transac-

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[2] Contrary to the implications in the Petition for Certiorari (at 3), the Administrative Law Judge merely held that, since the issue was not before him, he did not need to decide "whether there might be some concurrent jurisdiction . . . ." (38 FERC at 65,042, App. at 126a.) The Commission went further and rejected Michigan's claimed right to veto FERC's grant to Panhandle of the certificate of public convenience and necessity. (42 FERC at 61,347-349, App. at 50-55a.) And, the one Commissioner's dissent did not dispute the Commission's exclusive jurisdiction but only whether a condition affecting wholesale services to MichCon should have been imposed. (*Panhandle Eastern Pipe Line Co.*, 44 FERC (CCH) ¶ 61,410 at 62,321 (1988), App. at 90a-92a.)

tions like this one, however, they could seriously affect our ability to foster the development of an economically efficient system of interstate transportation.

(42 FERC at 61,349, App. at 55a.)

On the merits, the Commission amply supported its conclusion that the overall public convenience and necessity are served by Panhandle's interstate transportation and related facilities to serve National. As set forth in detail in the ALJ's Initial Decision, which was adopted in relevant part by the Commission, the $10 million or more of annual savings to National as a result of this transaction would aid National in its "struggle to survive" in the face of severe financial losses. (38 FERC at 65,042-43, App. at 128a-129a.) As "a significant employer, with 5,500 employees at its Great Lakes Steel plant," the savings to National generated by the project would help it "to avoid further cutbacks in its operations and to avoid further layoffs at its Great Lakes plant where it has already reduced its employment by half . . . ." (38 FERC at 65,043, App. at 129a.) This, the Commission found, would "be of benefit to the community where the National Steel plant is located." (*Id.*) Although the Commission considered the possibility of some cost-shifting in MichCon's retail rates, it rejected arguments by MichCon that this warranted disapproving the certificate. (38 FERC at 65,043-44, App. at 129a-132a.) Indeed, the Commission concluded that, irrespective of its approval of Panhandle's certificate, MichCon would lose National's load inasmuch as National was actively pursuing other supply alternatives. (38 FERC at 65,043-44, App. at 131a-132a.) Furthermore, the Commission found that the proposed interconnection and transportation service "would provide Panhandle itself with a substantial incremental load," which was important "particularly in light of Panhandle's load losses." (38 FERC at 65,044, App. at 132a.)[3] By

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[3] The evidence showed that "because of capacity constraints on Panhandle's existing interconnection with MichCon, Panhandle can-

spreading Panhandle's fixed costs over a larger volume of throughput, the transportation to National would eventually lower Panhandle's rates for the benefit of its customers in *all* states. (*Id.*) The certificate authorizing transportation from Oklahoma would also "preserve a large load for the domestic interstate market" since National was otherwise likely to turn to Canadian energy sources. (*Id.*)

The Commission's findings concerning the public convenience and necessity were succinctly summarized (38 FERC at 65,076, App. at 216a-217a) as follows:

> [1] Based on an evaluation of the overall benefits to National Steel, to Panhandle and its customers, to the communities near National Steel's plants and to the public interest by fostering competition, versus the potential detriments to MichCon and its other customers from the Panhandle proposal to service National Steel, it must be concluded that the benefits outweigh the potential detriments and that the proposal will serve the public interest. Therefore, granting of the application . . . is required by the public convenience and necessity.
>
> [2] The potential detriments to MichCon and its customers will occur regardless of whether the application . . . is granted because National Steel has a viable other supply option, the underwater pipeline, which it will be able to use in the near future and which is more attractive financially to National Steel than the current gas transportation arrangements with MichCon.

In the decision below, the United States Court of Appeals for the District of Columbia Circuit affirmed both

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not serve both MichCon's existing demands for transportation and National Steel's additional load" without constructing the proposed facilities. (38 FERC at 65,034, App. at 108a.) This contradicts Michigan's claim now that Panhandle's proposed construction was not necessary to accomplish the interstate transportation function. Michigan Pet. for Cert. at 11.

the Commission's findings on the merits and the Commission's conclusion concerning its jurisdiction to grant the certificate of public convenience and necessity. Without undertaking an exegesis on "the precise boundaries of FERC and state regulatory jurisdiction," the Court unanimously declared "we have no difficulty in holding that FERC has jurisdiction over the particular arrangement involved in the present controversy." (883 F.2d at 121, App. at 8a-9a.) It wrote:

> The arrangement in dispute involves merely interstate transportation of natural gas, a subject matter clearly within the Commission's jurisdiction. . . . The present arrangement is the subject of federal regulation pursuant to the NGA because the arrangement involves the transportation of natural gas in interstate commerce, not a local sale. It is undisputed that title to the gas passes in Oklahoma, not Michigan. Panhandle, the transporter of the gas, is not a party to the sale. Panhandle's role under the arrangement is simply to transport National's gas from one state to another across several intervening states. It is hardly conceivable that a transaction could fit more neatly into the category of 'transportation of natural gas in interstate commerce.'

(883 F.2d at 121, App. at 9a.) Inasmuch as the transaction merely involves Panhandle's transportation of third-party gas in interstate commerce, the D.C. Circuit had no doubt the matter is within FERC's jurisdiction: "Transportation in interstate commerce is clearly a subject for federal regulation under 15 U.S.C. § 717(b)." (883 F.2d at 122, App. at 10a.)[4]

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[4] Prior to FERC's issuance, on September 10, 1987, of the certificate authorizing Panhandle to serve National, MichCon filed a complaint with the Michigan Public Service Commission asking that it assert jurisdiction over Panhandle's proposed transportation and facilities. After FERC issued the certificate, declaratory judgment and injunctive actions were initiated in Michigan and were consolidated before the U.S. District Court for the Western District of Michigan. On September 29, 1987, the Michigan PSC issued an

REASONS FOR DENYING THE WRIT

I. SUMMARY

As set forth more fully below, a writ of certiorari is not warranted in this case. The decision of the D.C. Circuit is consistent with decisions of other circuits and long-standing interpretations of the Natural Gas Act by this Court. It involves a clear-cut application of law to the simplest set of jurisdictional facts.

Michigan's arguments to limit FERC's jurisdiction fly in the face of fifty years of history in which FERC (or its predecessor, the Federal Power Commission) has routinely considered and approved certificates of public convenience and necessity under NGA Section 7 for interstate transportation of natural gas directly to gas users and for pipeline facilities to effectuate direct transportation to gas users. Michigan's contention that the Commission's interstate transportation jurisdiction is restricted to deliveries to local distribution companies conflicts with holdings by this Court. The claim that NGA Section 1(b)'s local distribution proviso overrides FERC's jurisdiction over interstate transportation is rebuffed by clear legislative history and holdings of this Court which state that the local distribution proviso is "surplusage" and in no way limits the NGA's affirmative grant of jurisdiction over interstate transportation or sales for resale. Moreover, Michigan's argument, if adopted, would disrupt FERC's ability to regulate interstate pipelines and their transportation

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order prohibiting Panhandle from constructing the FERC-approved facilities and serving National. Eventually, the U.S. District Court and the Sixth Circuit held that FERC has exclusive jurisdiction over Panhandle's interstate transportation service and facilities, which preempts Michigan's regulation of Panhandle's service and facilities. *Michigan Consolidated Gas Co. v. Panhandle's Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989), *aff'g National Steel Corp. v. Long*, 689 F.Supp. 129 (W.D. Mich. 1988), *petition for cert. filed sub nom. State of Michigan v. Panhandle Eastern Pipe Line Co.*, 58 U.S.L.W. 3491 (U.S. Jan. 24, 1990) (No. 89-1160).

services and facilities. It would empower states to veto interstate pipeline facilities and services found by the Commission to be in the public interest, to order changes in pipeline's interstate facilities and services approved by FERC, and to order premature abandonment of facilities and services in violation of Section 7(b) of the NGA.

II. THE CRITERIA FOR A WRIT OF CERTIORARI ARE NOT SATISFIED IN THIS CASE.

There is nothing remarkable about the D.C. Circuit's decision affirming FERC's jurisdiction over interstate transportation of third-party owned gas and over facilities needed to perform that interstate transportation service. The D.C. Circuit's decision involves a clear-cut application of law to the simplest possible set of facts relevant to jurisdiction. As held by that court, "It is hardly conceivable that a transaction could fit more neatly into the category of 'transportation of natural gas in interstate commerce.'" (883 F.2d at 121, App. at 9a.) Michigan's requests for rehearing and for rehearing *en banc* were rejected without any judge asking for a vote thereon. (App. at 19a.)

Nor is there any conflict among the circuits. In a companion case, the Sixth Circuit reached the same conclusion concerning FERC's jurisdiction to approve Panhandle's interstate transportation and deliveries to National and the facilities associated therewith. *MichCon v. Panhandle*, 887 F.2d at 1300. That case is now pending before this Court on Michigan's separate petition for a writ of certiorari in No. 89-1160. Other courts directly or indirectly addressing this issue have reached a similar conclusion that FERC has jurisdiction over direct transportation to end-users, even if it lacks authority over direct sales. *See, e.g., FPC v. Louisiana Power and Light Co.*, 406 U.S. 621 (1972); *International Paper Co. v. FPC*. 438 F.2d 1349 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971). *Cf. Public Serv. Elec. & Gas Co. v. FPC*, 371 F.2d 1 (3d Cir.), *cert denied*, 389 U.S. 849 (1967).

III. MICHIGAN'S ARGUMENT CONFLICTS WITH THE STATUTE, THE LEGISLATIVE HISTORY, LONG-STANDING PRACTICE, AND DECISIONS OF THIS COURT.

At the heart of its position, Michigan would have this Court fundamentaly rewrite the Natural Gas Act. Michigan claims that the Commission exceeded its jurisdiction under the NGA by certificating interstate transportation for hire directly to a consumer and facilities needed to perform that interstate transportation service. In effect, Michigan seeks to break up the FERC's plenary authority over interstate transportation of natural gas by limiting the Commission's interstate transportation authority only to approving physical connections and deliveries to local distribution companies, not to gas users. Such a rewrite of the Act would nullify certificates of public convenience and necessity issued by FERC for the interstate transportation and delivery of gas to end users since the earliest days of the Natural Gas Act.[5]

The Commission's jurisdiction under the NGA reflects the limits of state regulation of interstate commerce in natural gas as they were understood by Congress at the time of enactment. When the NGA was enacted, it was understood that the states could regulate neither interstate transportation of natural gas nor sales for resale in interstate commerce. As explained by the Solicitor of the Federal Power Commission (FERC's predecessor) in hearings preceding enactment, "The States cannot control the wholesale rates extracted for natural gas thus transported, nor may they regulate any other of the phases of the interstate transportation."[6] As this Court held in

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[5] *See, e.g., Louisiana-Nevada Transit Co.*, 2 FPC 546 (1939), *aff'd sub nom. Arkansas Louisiana Gas Co. v. FPC*, 113 F.2d 281 (5th Cir. 1940).

[6] *Natural Gas*: Hearings on H.R. 11662 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess. 16 (1936) (Brief in Support of Constitutionality).

Pennsylvania v. West Virginia, 262 U.S. 553, 596-97 (1923):

> A state law, whether of the state where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs, or burdens such transmission [of natural gas], is a regulation of interstate commerce, a prohibited interference.

Only retail sales of natural gas and low pressure, local delivery systems for making retail sales were understood to be within the jurisdiction of the states. *See FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950). Michigan cites no cases which hold that pure interstate transportation could be regulated by the states.

Congress reflected its understanding of that division of authority in Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), which gives jurisdiction over interstate transportation exclusively to the Commission:

> *The provisions of this Chapter shall apply to the transportation of natural gas in interstate commerce*, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, *and to natural-gas companies engaged in such transportation* or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(Emphasis added.) In Section 7(c) of the Act, 15 U.S.C. § 717f(c), Congress required that, before intiating any interstate transportation service or constructing any facilities to render such service, an interstate pipeline ("natural gas company") must first obtain a certificate of public convenience and necessity from the Commission.

In contrast to the Commission's sales jurisdiction, which is limited to interstate "sales for resale" and excludes retail sales, the Commission's jurisdiction over in-

terstate transportation of natural gas is complete and encompasses transportation for hire and transportation to users for consumption. NGA Section 1(b), 15 U.S.C. § 717(b). In *United Gas Pipe Line Co. v. FPC*, 385 U.S. 83, 89 (1966), this Court succinctly summarized the NGA's broad grant to FERC of transportation authority:

> The Act gives the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct matter, whether the transportation is for hire or for sale and whether the sale is for consumption or resale. *FPC v. East Ohio Gas Co.*, 338 U.S. 464; *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1; *Panhandle Eastern Pipe Line Co. v. FPC*, 359 F.2d 675.

In *East Ohio*, 338 U.S. at 468, this Court rejected efforts to limit the Commission's transportation jurisdiction to transportation in conjunction with wholesale deliveries.[7] *See FPC v. Louisiana P&L*, 406 U.S. 621.

Throughout its history, the Commission has exercised transportation jurisdiction over (1) interstate pipelines' construction and operation of facilities to transport and deliver natural gas directly to consumers and (2) the

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[7] Even the dissenting Justice in *East Ohio* conceded that the Commission's jurisdiction over interstate "transportation for hire" was exclusive. Section 1(b) "would quite obviously within the words of the statute give exclusively to the Power Commission jurisdiction over companies which might act in the nature of common carriers transporting in interstate commerce for hire." 338 U.S. at 487 (Jackson, J., dissenting).

Pursuant to NGA Section 1(c), 15 U.S.C. § 717(c), which was enacted in response to the *East Ohio* decision, a state may now regulate natural gas transportation by companies which (a) are located wholly within the boundaries of the state and (b) redeliver entirely within the state gas received from other states. While Section 1(c) resolves possible conflicts over regulation of companies operating entirely within one state, it does not give any support to state regulation of transportation by an interstate pipeline such as Panhandle.

interstate transportation and delivery of gas through those facilities. *See FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 24 (1961); *supra* note 5. Historically, the Commission typically exercised its transportation jurisdiction over interstate pipelines' deliveries to users and related delivery facilities in conjunction with retail sales made by interstate pipelines even though the Commission did not exercise authority over those retail sales. *See Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Indiana*, 332 U.S. 507, 523 and n.23 (1947) [hereinafter *Panhandle/Indiana*]; *Panhandle Eastern Pipe Line Co. v. FPC*, 232 F.2d 467, 471 (3d Cir.), *cert. denied*, 352 U.S. 891 (1956) ("This control over gas transportation by the Commission is completely independent of the sale of the gas and just as important.").

In *FPC v. Louisiana P&L*, 406 U.S. at 636, this Court squarely upheld the Commission's exclusive power to regulate interstate transportation of natural gas directly to industrial consumers:

> Each of [the factors of Section 1(b)] is an independent grant of jurisdiction and, though the Act's application to "sales" is limited to sales of interstate gas for resale, *the Act applies to interstate "transportation" regardless of whether the gas transported is ultimately sold retail or wholesale.*

(Emphasis added.) Further, the Court wrote:

> Congress' grant of sales jurisdiction as to sales for resale and the prohibition as to direct sales were meant to apply exclusively to *rate setting*, and in no wise limited the broad base of "transportation" jurisdiction granted the FPC.

(*Id.* at 640). That decision also confirmed the Commission's *certificate* authority over transportation directly to a user: "A 'jurisdictional' pipeline transports natural gas in interstate commerce and for that reason is subject to FPC certification jurisdiction." (*Id.* at 626, n.1.) *See FPC v. Transcontinental*, 365 U.S. at 4 ("[B]ecause

it does not entail a sale for resale in interstate commerce, [this transaction] is not subject to the Commission's jurisdiction *except insofar as § 7 requires the Commission to certificate the transportation of gas pursuant to the sale.*" (Emphasis added.)).

Michigan rests its argument to limit FERC's jurisdiction over interstate transportation deliveries to users upon the weak reed of Section 1(b)'s "local distribution" exemption. As this Court has recognized, however, that proviso was merely intended to clarify Congress' decision not to include *retail sales* within the scope of the NGA: it does not limit the Commission's jurisdiction over interstate transportation. This is explicitly stated in the House and Senate Committee reports, H.R. Rep. No. 709, 75th Cong., 1st Sess. 3, and S. Rep. No. 1162 (1937), 75th Cong., 1st Sess. 3 (1937):

> That part of the negative declaration stating that the act shall not apply to 'the local distribution of natural gas' is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character.

On at least two occasions, this Court has recognized the "local distribution" exemption to be surplusage, citing the explicit legislative history. *East Ohio*, 338 U.S. at 470-71; *FPC v. Louisiana P&L*, 406 U.S. at 637 n.14. In *FPC v. Louisiana P&L*, this Court wrote:

> It is well established that the proviso [concerning local distribution] was added to the Act merely for clarification *and was not intended to deprive* [*the*] *FPC of any jurisdition otherwise granted by* § *1(b).*

(*Id.* (emphasis added).)

The two cases principally relied upon by Michigan do not call for a different result as both cases involved only the ability of states to regulate *retail sales* by interstate

pipelines—*not* interstate transportation services—in the absence of federal regulation of retail sales under the NGA. *See Panhandle/Indiana*, 332 U.S. at 516-20; *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 334 (1951) [hereinafter *Panhandle/Michigan*].[8]

In neither of those cases did the Supreme Court doubt that the federal Commission has exclusive authority to regulate the *interstate transportation* of the gas to be sold or the facilities to perform such transportation. Indeed, in *Panhandle/Indiana*, the Court recognized with approval the fact that the Commission had issued a certificate of public convenience and necessity "under § 7(c) of the Natural Gas Act to extend [the pipeline's] facilities to serve the DuPont plant"—the very action which Michigan now declares is beyond FERC's legal authority. 332 U.S. at 523 and n.23. Moreover, the Court reiterated that interstate transportation deliveries to a user are within the Commission's jurisdiction: "the matter of interrupting service is one largely related, as appellees say, to *transportation and thus within the jurisdiction of the Federal Power Commission to control* . . . ." (*Id.* at 523 (emphasis added).)

Nor is it possible, as Michigan would have it, to break up Panhandle's interstate transportation service for National so as to separate Panhandle's "delivery" and associated facilities from the "interstate transportation" subject to FERC's jurisdiction. Regulation of interstate transportation for a shipper necessarily involves the pipeline's receipt, transportation and delivery of the shipper's natural gas, plus the facilities, rates, and terms for rendering such service. Without control over an interstate pipeline's delivery of gas, the NGA's grant of

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[8] *Panhandle/Indiana* approved state regulation of *rates* charged by a pipeline for retail sales, while *Panhandle/Michigan* held that a state could require an interstate pipeline to obtain a state *certificate* permitting a retail sale.

jurisdiction over "transportation of natural gas in interstate commerce" would be ineffectual. *See FPC v. Louisiana P&L,* 406 U.S. 621. It would leave FERC powerless to control the size, location, nature and use of interstate transportation facilities, as well as the rates, curtailments and myriad other attributes of the transportation services. Moreover, this Court has held that "[g]as crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the *entire* journey." *Maryland v. Louisiana,* 451 U.S. 725, 755 (1981) (emphasis added). Interstate transportation begins with receipt by the pipeline and ends only after delivery by the pipeline. *See United Gas Pipe Line v. FPC,* 385 U.S. 83; *Missouri v. Kansas Natural Gas Co.,* 265 U.S. 298, 308 (1924). Indeed, just as the principal cases cited by Michigan held that the pipeline's retail sales to users were sales in interstate commerce,[9] so is it clear that the pipeline's transportation deliveries in this case are transportation in interstate commerce—a matter in FERC's exclusive jurisdiction under NGA Section 1(b).

Unlike the retail sales cases cited by Michigan, no "regulatory gap" is left after the Commission has exercised its jurisdiction over the interstate transportation service to National. All aspects of Panhandle's interstate transportation from receipt through delivery are regulated by FERC. In the proceedings below, the Commission performed a comprehensive review of the term, rates and interruptibility of the service; the nature and identity of the shipper; the source of the gas; the point of receipt and delivery; the existing facilities to be used and

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[9] *Panhandle/Indiana,* 332 U.S. at 513; *Panhandle/Michigan,* 341 U.S. at 333. In *East Ohio,* the Court indicated that interstate transportation ends when the gas is reduced in pressure and enters community systems of local mains for distribution. 338 U.S. at 469-470. That is not at issue here since Panhandle will deliver at high pressure directly off its mainline, and a low pressure community distribution system is not involved in this case.

the new ones to be constructed; and the project's impacts on the pipeline's existing customers, on producers, on the pipeline, on community and national interests, on MichCon, and on the shipper, National. (*Panhandle Eastern Pipe Line Co.*, 40 FERC (CCH) ¶ 61,220 at 61,751-754 (1987), App. at 67a-73a; 38 FERC at 65,034-46, App. at 105a-136a; 38 FERC at 65,076, App. at 216a-217a).[10] The Commission concluded that the public convenience and necessity is served by the project as conditioned by its orders, and it granted a certificate for the interstate transportation of gas and the construction of facilities therefor. The D.C. Circuit affirmed the Commission's findings. (883 F.2d at 121-124, App. at 8a-15a.)

At this time, no aspect of Panhandle's service is left to be regulated by the State of Michigan. Indeed, any effort by Michigan to impose state certificate and regulatory requirements on the same interstate transportation and facilities would necessarily lead to direct, irreconcilable conflicts.[11] As recognized by the Commission below, state vetoes or overlapping regulation of FERC's certificates would disrupt FERC's "ability to foster the development of an economically efficient system of interstate transportation." (42 FERC at 61,349, App. at 55a.) Such state regulation of interstate transportation would also place Panhandle in the impossible dilemma of being unable "to serve two masters." What could Michigan do at this point? Would it change the point of delivery? the

[10] Although uncontested below and therefore not discussed, FERC's orders, as well as its regulations and Panhandle's tariffs, also govern many other aspects of the service to National, including the quality of gas to be delivered, the pressure at which deliveries are to be made, the priorities for interruption and curtailment, the requirements for maintaining balance between a shipper's injections and withdrawals, procedures for scheduling Panhandle's receipts and deliveries, penalties for noncompliance, warranties of title, and the ability of a customer to change receipt and delivery points.

[11] *MichCon v. Panhandle*, *supra* note 4, 887 F.2d at 1300-02.

rate? the nature or location of the facilities to be constructed? the identity of the customer? the priorities for Panhandle curtailments of deliveries? the terms of the service? Would it impose an additional "delivery" charge or alter the pressure or quality specifications? Or would it simply "st[and] at the state line and impose[] its regulation upon the final step in the process at the moment the interstate commodity enter[s] the state"? *Missouri v. Kansas Natural Gas*, 265 U.S. at 308.

Presumably, under Michigan's conception of its powers, it could do all of the above; and, under Michigan's logic, a state could order the modification, reduction or termination of service in violation of NGA Section 7(b), 15 U.S.C. § 717f(b), which obligates Panhandle to continue rendering services until permitted by FERC to terminate them. In fact, after FERC authorized Panhandle's service to National, the Michigan PSC issued an order to Panhandle prohibiting Panhandle's construction and service to National—in effect vetoing FERC's orders—pending the Michigan PSC's separate decision on whether Panhandle's FERC-approved transportation service should be permitted.[12] However, it cannot seriously be believed that Michigan is free under the NGA and the Constitution to countermand FERC's regulation of Panhandle. As this Court held in *United Gas Pipe Line v. FPC*, 385 U.S. at 88, "the responsibility of the Commission could not adequately be met if it were powerless to assure that facilities 'certificated to transport this gas' . . . continued to operate."

There is likewise no merit to Michigan's argument that the Commission's NGA jurisdiction over interstate transportation should be circumscribed because the exercise of that jurisdiction may "affect" state regulation of local distribution companies' rates and rate designs. Unques-

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[12] *MichCon v. Panhandle*, 887 F.2d at 1298, 1301.

tionably, the Commission's regulation of interstate pipelines' rates and services and the construction and operation of facilities affects both 'local interests" and state regulation of local distribution companies' costs, rates and services in myriad ways and in every state. *See, e.g., Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). That is the inevitable consequence of federal regulation of interstate pipelines' facilities, rates and services under the NGA. That fact does not, however, overturn federal regulation of interstate pipelines. Indeed, given the broad repercussions of FERC's actions, the Commission cannot be faulted for having weighed all factors affecting local and national interests, including possible impacts on MichCon's rates,[13] in concluding that the project was required by the public convenience and necessity. *See FPC v. Transcontinental*, 365 U.S. 1. While Michigan may not agree with the merits of the orders below, FERC certainly does not lose its subject matter jurisdiction simply because it considered the full range of factors affecting the overall public interest.

Further, contrary to Michigan, the recent increase in stand-alone ("unbundled") interestate transportation services for shipper-owned gas, *i.e.*, interstate transportation for hire, does not justify a novel statutory construction that limits the Commission's long-established jurisdiction over interstate transportation and the facilities used therefor. Changes in the industry are the stuff of which legislation is made; they are not a basis for a judicial rewrite of the fundamental jurisdictional structure of the Act.

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[13] MichCon itself introduced evidence concerning possible impacts on its rates in the hopes of persuading the Commission to disapprove the certificates. (App. at 116a-117a, 129a-130a.)

CONCLUSION

The petition for writ of certiorari should be denied. This case presents a pure case of interstate transportation for hire of natural gas. It is a matter clearly within the jurisdiction of the Federal Energy Regulatory Commission under Section 1(b) of the Natural Gas Act. No conflict exists among the circuits or with any decisions of this Court.

Respectfully submitted,

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March 28, 1990

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Nos. 89-1160, 89-1161

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MICHIGAN, MICHIGAN PUBLIC SERVICE COMMISSION, WILLIAM E. LONG AND EDWYNA G. ANDERSON,
Petitioners,

v.

PANHANDLE EASTERN PIPE LINE COMPANY and NATIONAL STEEL CORPORATION,
Respondents.

STATE OF MICHIGAN AND MICHIGAN PUBLIC SERVICE COMMISSION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Sixth and the District of Columbia Circuits

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BRIEF FOR PANHANDLE EASTERN PIPE LINE COMPANY IN OPPOSITION

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Dated: March 28, 1990

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QUESTIONS PRESENTED

Whether the Natural Gas Act of 1938: (1) Confers exclusive jurisdiction upon the Federal Energy Regulatory Commission to authorize the transportation by an interstate pipeline of natural gas purchased by an industrial consumer in one state and delivered in another state: and (2) Preempts the state to which the gas is transported from requiring the interstate pipeline to obtain a state certificate in order to perform the service authorized by the federal agency.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1160

STATE OF MICHIGAN, MICHIGAN PUBLIC SERVICE COMMISSION, WILLIAM E. LONG AND EDWYNA G. ANDERSON,

Petitioners,

v.

PANHANDLE EASTERN PIPE LINE COMPANY and NATIONAL STEEL CORPORATION,

Respondents.

No. 89-1161

STATE OF MICHIGAN AND MICHIGAN PUBLIC SERVICE COMMISSION,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Sixth and the District of Columbia Circuits

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BRIEF FOR PANHANDLE EASTERN PIPE LINE COMPANY * IN OPPOSITION

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* Panhandle Eastern Pipe Line Company, a respondent herein, is a wholly-owned subsidiary of Panhandle Eastern Corporation, which is publicly-owned. Panhandle Eastern Corporation has only one affiliate that has publicly owned voting securities, TEPPCO Partners, LP.

OPINIONS BELOW

The petitions for writs of certiorari in No. 89-1160 and No. 89-1161 are integrally related. The petition in No. 89-1160 seeks review of a decision of the Sixth Circuit; the petition in No. 89-1161 seeks review of a decision of the District of Columbia Circuit. The opinion of the Sixth Circuit (Pet. App.[1] (89-1160) 1a-12a) is reported at 887 F.2d 1295; the opinion of the district court in that case (*id.*, 21a-41a) is reported at 689 F. Supp. 729. The opinion of the District of Columbia Circuit (Pet. App. (89-1161) 1a-17a) is reported at 883 F.2d 117; the agency orders in that case (*id.*, 22a-64a; 65a-86a; and 93a-221a (initial decision)) are reported at 42 F.E.R.C. ¶ 61,076; 40 F.E.R.C. ¶ 61,220; and 38 F.E.R.C ¶ 63,009, respectively.

JURISDICTION

In No. 89-1160, the judgment of the Sixth Circuit was entered on October 6, 1989, and a petition for rehearing was denied on November 3, 1989; the petition for a writ of certiorari was filed on January 24, 1990. In No. 89-1161, the judgment of the District of Columbia Circuit was entered on August 18, 1989, and a petition for rehearing and suggestion for rehearing *en banc* were denied on October 26, 1989; the petition for a writ of certiorari was filed on January 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The instant petitions for certiorari seek review of: (1) a decision of the District of Columbia Circuit affirming orders of the Federal Energy Regulatory Commission ("FERC" or "Commission") which granted authorization for the transportation of natural gas in interstate commerce from Oklahoma to Michigan and for the connecting

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[1] "Pet. App." refers to the appendices filed by petitioners in Nos. 89-1160 and 89-1161, respectively.

facilities; and (2) a decision of the Sixth Circuit affirming the judgment of a district court, which held that this action by FERC and the provisions of the Natural Gas Act preempted the regulatory authority of the State of Michigan over this transaction.

A. Statutory Background

The interstate natural gas industry is regulated by FERC, principally under the Natural Gas Act of 1938, 15 U.S.C. 717-717z. Section 1(b) of that Act, 15 U.S.C. 717(b), which establishes the scope of FERC's regulatory jurisdiction in this field, provides as follows:

> The provisions of this [Act] shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

In turn, Section 7 of the Natural Gas Act, 15 U.S.C. 717f, grants to FERC one of its chief substantive powers, namely the power to issue certificates of public convenience and necessity authorizing the construction, acquisition or operation of facilities for, among other things, the transportation of natural gas in interstate commerce, and the providing of interstate transportation service, and to authorize abandonment of any jurisdictional facilities or services.

B. The Facts of This Case

In this case, the Commission, acting pursuant to Section 7 of the Natural Gas Act, issued a certificate of public convenience and necessity authorizing respondent Panhandle Eastern Pipe Line Company ("Panhandle"), an interstate natural gas pipeline, to render a third-party

transportation service for respondent National Steel Corporation ("National Steel"), which operates a steel plant in Michigan. Specifically, FERC authorized Panhandle to transport gas from Oklahoma, where it is purchased by National Steel, to National Steel's plant site in Michigan, and to install delivery tap facilities to perform this service.

National Steel theretofore had received all of the gas supplies for its plant through the facilities of Michigan Consolidated Gas Company ("MichCon"), a local distribution company regulated by petitioner Michigan Public Service Commission, an agency of the State of Michigan (collectively, "MPSC"). MPSC, among others, took the position in the FERC proceedings that a state statute, Michigan Act 69 of the Public Acts of 1929 ("Act 69"), Mich. Comp. Laws 460.501-460.502 (Pet. App. (89-1160) 42a-44a), required Panhandle to obtain from the MPSC a *state* certificate of public convenience and necessity for this service to National Steel. It argued that the transaction was outside the FERC's jurisdiction.

FERC rejected the MPSC's position, concluding that it had exclusive jurisdiction over all aspects of the proposed transportation and delivery of gas by Panhandle. Pet. App. (89-1161) 50a-55a. FERC found on the evidentiary record that the public convenience and necessity supported the transaction, and issued a certificate to Panhandle for these services. On judicial review of FERC's orders, the District of Columbia Circuit affirmed, both on the merits of FERC's decision and on its finding of jurisdiction. *Id.* at 8a-10a. That court found it unnecessary to reach the question whether FERC's orders preempted the authority of the MPSC under Michigan Act 69. *Id.* at 10a.

The district court in Michigan, however, found that the FERC-issued certificate does preempt the MPSC from enforcing Act 69 against Panhandle, concluding that FERC's authority encompassed both the transportation of

gas and its ultimate delivery by Panhandle to National Steel. Pet. App. (89-1160) 21a-39a. The Sixth Circuit affirmed in a thorough opinion. *Id.* at 1a-12a.

In this Court, the MPSC does not challenge the correctness of FERC's orders on the merit of Panhandle's request for a certificate to transport and deliver gas to National Steel's plant, but seeks review only on the jurisdictional question.

ARGUMENT

The District of Columbia Circuit found in a well-reasoned opinion that delivery by an interstate pipeline of natural gas from a supply source in one state to an industrial consumer in another state constitutes an inseparable part of interstate transportation, which plainly falls within FERC's exclusive jurisdiction under the Natural Gas Act. In turn, the Sixth Circuit found in an equally well-reasoned opinion that there is no room under the federal statutory framework for potentially conflicting state regulation of precisely the same deliveries. These decisions do not conflict with any decision of this Court or any other court of appeals. Review by this Court is not warranted.

1. The courts below properly rejected the MPSC's claim that the *deliveries* of gas by Panhandle to National Steel should be regarded as distinct from the *interstate transportation* of this gas from Oklahoma to Michigan, and separately regulated by the MPSC as "local distribution."

a. Initially, the District of Columbia Circuit correctly held that the delivery of gas by an interstate pipeline to an industrial consumer falls within the "interstate transportation" of gas regulated exclusively by FERC. That such deliveries constitute interstate transportation and not local distribution is well settled by the decisions of this Court and other courts. Thus, for example, in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), the

Court held that FERC's predecessor, the Federal Power Commission ("FPC"), had the authority by virtue of its jurisdiction over interstate transportation to order the curtailment of deliveries by an interstate pipeline to an industrial consumer during a period of shortages, as a means of conserving scarce gas supplies for higher-priority residential and commercial consumers. Section 1(b), the Court found, preserved state jurisdiction only over the rates for *sales* of gas by the pipeline to industrial consumers; all other aspects of such service by the pipeline came under "the broad base of 'transportation' jurisdiction granted the FPC." 406 U.S. at 640. *Accord FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) (affirming Commission jurisdiction over transportation and delivery of third-party gas by an interstate pipeline); *see also Maryland* v. *Louisiana*, 451 U.S. 725, 755 (1981) (concluding that "[g]as crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey"); *United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83, 89 (1966) (Section 1(b) "gives the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct matter, whether the transportation is for hire or for sale and whether the sale is for consumption or resale"); *International Paper Co.* v. *FPC*, 438 F.2d 1349, 1355 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971) (holding that federal transportation jurisdiction under Section 1(b) encompasses interstate transportation by an industrial consumer of its own gas through its own pipeline).

It follows, then, that Panhandle's delivery of gas to National Steel cannot be said to constitute "local distribution" subject to state regulation. As this Court has explained, "what Congress must have meant by 'facilities' for 'local distribution' was equipment for distributing gas among consumers within a particular local community, not the high-pressure pipe lines transporting the gas to the local mains." *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 469-470 (1950). Under this settled interpretation of Sec-

tion 1(b), the taps and related facilities connecting Panhandle's high-pressure interstate pipeline to the National Steel plant are not "local mains," and the delivery of gas through such facilities, therefore, is not "local distribution" within the meaning of Section 1(b).

On the contrary, these facilities plainly fall within FERC's exclusive jurisdiction over interstate pipeline facilities and operations. By asserting jurisdiction over these same facilities, the MPSC essentially seeks to have its own regulatory say over the FERC-approved transaction. Nor is there merit to the MPSC's claim of concurrent or sequential jurisdiction in this circumstance. *See National Fuel Gas Supply Corp.* v. *Public Serv. Comm'n*, 894 F.2d 571, 576-577 (2d Cir. 1990).

Moreover, the MPSC's claim would do violence to the entire structure of federal regulation. The act of "delivering" is an integral part of the transportation for wholesale customers, or the sale for resale to such customers. It is well-settled under the Natural Gas Act that the states have no jurisdiction over the delivery of natural gas by an interstate pipeline to a local distribution company for resale to the local distribution company's retail customers. *E.g., Illinois Natural Gas Co.* v. *Central Illinois Public Serv. Co.*, 314 U.S. 498 (1942). Since these transactions involve the same "delivery" act as the transportation for an industrial customer, Petitioners' contention must fail. There is no basis in the statute for the MPSC's singular claim that the states should be deemed to have jurisdiction over a pipeline's transportation deliveries to an industrial consumer such as National Steel.

Thus, the District of Columbia Circuit was on exceptionally firm ground in affirming FERC's determination that deliveries of gas by Panhandle to National Steel are within FERC's exclusive jurisdiction over "interstate transportation" and do not at any point constitute the "local distribution" of gas within the meaning of Section 1(b). As the court aptly stated, "Panhandle's role under the arrangement is simply to transport National's gas

from one state to another across several intervening states. It is hardly conceivable that a transaction could fit more neatly into the category of 'transportation of natural gas in interstate commerce.'" Pet. App. (89-1161) 9a.

b. In this circumstance, the Sixth Circuit likewise correctly held that the FERC-issued certificate preempted the MPSC's authority under Michigan Act 69 to require that Panhandle obtain a state certificate of public convenience and necessity for its delivery of gas to National Steel. As the district court stated in the case below, FERC's plenary authority over interstate transportation extends "to the point of delivery and covers the facilities through which the gas is delivered." Pet. App. (89-1160) 25a (citations omitted).

Hence, the Sixth Circuit and the district court properly concluded that there is no point at which Panhandle's transportation and delivery of gas in this case can be said to bring Panhandle within the regulatory authority of the MPSC. As the court of appeals stated: "Were we to permit the MPSC to cancel the FERC's approval of the Panhandle-National Steel bypass, we would subordinate federal regulatory power to state regulatory power in the complete absence of authority to do so." Pet. App. (89-1160) 11a.

Moreover, as both the Sixth Circuit and the district court noted, the foregoing conclusion finds strong support in this Court's opinion in *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988), which recently rejected MPSC's attempt to assert jurisdiction over the issuance of securities by FERC-regulated interstate pipelines. The Court held the MPSC's authority preempted by the Natural Gas Act. Although the Act does not expressly authorize FERC to regulate such securities issuance, the Court in *Schneidewind* found that "the things [the MPSC's] regulation is directed at, the control of rates and facilities of natural gas companies, are precisely the things over which FERC has comprehensive authority." 485 U.S. at 308. In the instant case, the MPSC's claim of authority falls even

more squarely in the federal domain, since it directly seeks to regulate interstate transportation, which is expressly within the statutory grant of authority to FERC.[2]

c. The MPSC asserts that this case presents issues of importance to Michigan ratepayers because of what it terms the "bypass" of MichCon's facilities by Panhandle. Pet. (89-1160) 5-6; Pet. (89-1161) 6-7. Both the MPSC and MichCon, however, had ample opportunity, which they exercised, in extensive hearings before the administrative agency to present evidence and arguments on the local impact of Panhandle's proposed deliveries of gas to National Steel. Thus, the local impact question was fully aired before the FERC. On the basis of the record as a whole, both the administrative law judge and the Commission found that the public convenience and necessity warranted the authorization requested by Panhandle, and the District of Columbia Circuit affirmed such findings on the merits. The MPSC's claim of jurisdiction overlooks Justice Black's admonition in the *East Ohio* case that "[r]egardless of whether it might have been wiser and more farseeing statesmanship for Congress to have [permitted

[2] Nor does this Court's opinion of last term in *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n*, —— U.S. ——, 109 S.Ct. 1262 (1989), support the MPSC's claim of jurisdiction here. That case concerned the validity of a state conservation agency order that cancelled after a certain time the right of any natural gas producer to make up in a later period the amounts by which it under-produced from its wells under the state's proration rules in earlier periods. FERC in that instance supported the state's view that its order did not interfere with the federal scheme of regulation of interstate pipelines, although the pipelines' ability to purchase gas and the price of such purchases admittedly was affected. The Court agreed, distinguishing its previous decisions in *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Board*, 474 U.S. 409 (1986), and *Northern Natural Gas Co.* v. *State Corporation Comm'n*, 372 U.S. 84 (1963), which held similar state orders to be preempted when directed at interstate pipeline purchasers rather than at producers. Here, too, the MPSC seeks to regulate the interstate pipeline itself, and so this case is more akin to *Transcontinental* and *Northern Natural* than to *Northwest Central*.

state jurisdiction in this circumstance], we should not do so through the interpretative process." 338 U.S. at 474.

2. Finally, the decisions of the courts below do not conflict with this Court's decisions in *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Serv. Comm'n*, 341 U.S. 329 (1951), or *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n of Indiana*, 332 U.S. 507 (1947), as the MPSC alleges (Pet. (89-1161) 9-13). Those cases involved Commerce Clause challenges to state regulatory orders governing *sales* of gas by interstate pipelines to industrial consumers within the state. Here, in contrast, Panhandle makes no sales to National Steel, either in Michigan or elsewhere, but merely transports gas purchased by National Steel from a third-party producer in Oklahoma. Thus, the authority of the states over consumptive sales of gas within their borders simply is not presented in this case.

Moreover, as the Court expressly cautioned in both of the *Panhandle* cases (332 U.S. at 523; 341 U.S. at 336; *see also id.* at 338 (Frankfurter, J., dissenting) (quoting from the government's brief as *amicus curiae*)), there were in those cases no orders by FERC's predecessor, the Federal Power Commission, posing any conflict with the states' claims of authority. In the instant case, of course, FERC expressly authorized Panhandle's transportation and delivery of gas for National Steel, and in so doing specifically found that its jurisdiction was exclusive. *See* Pet. App. (89-1161) 54a-55a. Given this well-considered action by the agency charged by Congress with administering the Natural Gas Act, the MPSC's conflicting claim of authority plainly does not find support in the two *Panhandle* opinions of this Court.

CONCLUSION

For the foregoing reasons, the Court should deny the MPSC's petitions for writs of certiorari.

Respectfully submitted,

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Dated: March 28, 1990

No. 89-1161

MAR 28 1990

CLERK

n the Supreme Court of the United States

October Term, 1989

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tate of Michigan, and Michigan Public Service
Commission, petitioners

v.

Federal Energy Regulatory Commission

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE
FEDERAL ENERGY REGULATORY COMMISSION
IN OPPOSITION**

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QUESTION PRESENTED

Whether transportation of interstate natural gas by an interstate pipeline company directly to a single industrial owner/consumer in Michigan is "transportation * * * in interstate commerce" within the meaning of Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), and thus subject to the jurisdiction of the Federal Energy Regulatory Commission.

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STATE OF MICHIGAN, AND MICHIGAN PUBLIC SERVICE COMMISSION, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 883 F.2d 117. The opinions and orders of the Federal Energy Regulatory Commission (Pet. App. 20a-221a) are reported at 38 F.E.R.C. ¶ 63,009, 40 F.E.R.C. ¶ 61,219, 42 F.E.R.C. ¶ 61,076, 42 F.E.R.C. ¶ 61,381, 44 F.E.R.C. ¶ 61,410, and 44 F.E.R.C. ¶ 61,424.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1989. A petition for rehearing was denied on October 26, 1989 (Pet. App. 18a). The petition for a writ of certiorari was filed on January 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1(b) of the Natural Gas Act (NGA), 15 U.S.C. 717(b), provides that the NGA "shall apply to the transportation of natural gas in interstate commerce * * * but shall not apply to any other transportation * * * of natural gas or to the local distribution of natural gas." Under Section 7(c) of the NGA, 15 U.S.C. 717f(c), a natural gas company may not "engage in the transportation * * * of natural gas, subject to the jurisdiction of the Commission" nor "undertake the construction or extension of any facilities therefor * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations."

2. a. In this case, Panhandle Eastern Pipe Line Corporation (Panhandle), an interstate pipeline, applied to the Federal Energy Regulatory Commission for a certificate of public convenience and necessity authorizing it to transport gas purchased in Oklahoma by National Steel Corporation (National Steel) to National Steel's Michigan plant for consumption there. National Steel had previously purchased gas from Michigan Consolidated Gas Company (MichCon), a local distribution company in Michigan. MichCon had also transported gas that National Steel purchased for its own use from third parties. Faced

with loss of National Steel as a customer, MichCon, along with petitioners State of Michigan and Michigan Public Service Commission, opposed certification of the proposed transportation of gas and construction of the connection between Panhandle's interstate pipeline and National's plant.[1] They contended, *inter alia*, that FERC lacked jurisdiction to certify the transaction at issue because it constituted "the local distribution of natural gas"—as opposed to "the transportation of natural gas in interstate commerce." 15 U.S.C. 717(b). See Pet. App. 4a-7a, 8a.

b. After a lengthy hearing, an administrative law judge concluded that the NGA conferred jurisdiction on the Commission to certify Panhandle's proposed service and that the arrangement would serve the

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[1] An interstate pipeline owned by Panhandle traverses National Steel's property in Michigan. Under the agreements giving rise to this case, Panhandle and National Steel arranged that Panhandle would add fittings and pipes to tap its line at the National Steel location. Pet. App. 4a-5a. Absent this connection, Panhandle would have had to deliver the gas to MichCon, which would in turn deliver it to National Steel. In a related case, *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1297 (1989), petition for cert. pending, No. 89-1160 (filed Jan. 24, 1990), the Sixth Circuit noted that under preexisting arrangements Panhandle had transported gas purchased by National Steel in Oklahoma to Michigan for 41 cents per 1,000 cubic feet; MichCon in turn charged National Steel 80 cents per 1,000 cubic feet to transport the gas five miles to National Steel's plant.

The parties and the court of appeals referred to the new arrangement as a "bypass." That term refers to the transportation of interstate natural gas (including construction of necessary facilities) directly to an end-user by an interstate pipeline in a situation in which an existing local distribution company asserts that it is able and willing to perform the transportation service.

public convenience and necessity. Pet. App. 105a-139a. The ALJ found that the proposed service would produce cost savings to National Steel on the order of $10,000,000 to $12,000,000 per year minus additional expenditures necessary to arrange for backup service from MichCon, that these savings would materially improve National Steel's competitive position and would thereby benefit its employees and the community, and that these advantages would more than offset the increased costs that remaining customers or shareholders might be required to bear. *Id.* at 126a-130a; see also *id.* at 106a-121a.

c. The Commission affirmed the ALJ's decision with respect to the proposed service and granted Panhandle a certificate authorizing both the transportation service and the construction and operation of facilities to provide the service. Pet. App. 65a-86a. The Commission rejected petitioner's contention that it lacked jurisdiction under Section 1(b) of the NGA. The Commission explained that the case "involves natural gas that is purchased by National Steel in Oklahoma and transported by Panhandle to Michigan"; thus, it continued, the gas "will be moving in interstate commerce as defined by the NGA." Pet. App. 49a. Noting that its jurisdiction "extends over the transportation of gas to be delivered to end-users" (*ibid.*), the Commission rejected petitioner's contention that the transaction should be deemed the local distribution of gas for purposes of the NGA's jurisdictional provision (*id.* at 50a-55a).[2]

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[2] With respect to the merits of the application, the Commission noted that although it had "indicated a preference for service to industrial customers by LDC's [local distribution companies, such as MichCon]," it had also "made clear that

3. The court of appeals upheld the Commission orders, ruling that "the Commission's decision is supported by substantial evidence and is neither arbitrary nor capricious." Pet. App. 15a. The court acknowledged that "local distribution of natural gas" is not subject to Commission jurisdiction under the Natural Gas Act, but found that the arrangement between Panhandle and National Steel "involves merely interstate transportation of natural gas, a subject matter clearly within the Commission's jurisdiction." *Id.* at 9a. The court explained:

> The present arrangement is the subject of federal regulation pursuant to the NGA because the arrangement involves the transportation of natural gas in interstate commerce, not a local sale. It is undisputed that title to the gas passes in Oklahoma, not Michigan. Panhandle, the transporter of the gas, is not a party to the sale. Panhandle's role under the arrangement is simply to transport National's gas from one state to another across several intervening states. It is hardly conceivable that a transaction could fit more neatly into the category of "transportation of natural gas in interstate commerce."

Ibid.[3]

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it would not rigidly follow that rule, but rather examine the individual circumstances of each before applying the policy." Pet. App. 68a. From that perspective, it upheld the ALJ's assessment of the balance of considerations relevant to the bypass at issue. See Pet. App. 67a-69a.

Commissioner Stalon dissented with respect to the merits of the Commission's decision. He did not, however, criticize the majority's analysis of the jurisdictional issue presented by the petition. Pet. App. 87a-92a; *id.* at 64a.

[3] In a separate action, MichCon and petitioners have sought to establish that state authorities have concurrent jurisdic-

ARGUMENT

The decision of the court of appeals is correct, and is supported by a number of this Court's decisions recognizing the scope of the Commission's jurisdiction over the interstate transportation of natural gas. The decision below does not conflict with decisions relied upon by petitioners—decisions which in the main involve limits on the Commission's authority to regulate interstate sales of natural gas, a separate and independent head of Commission jurisdiction. Further review is not warranted.

1. This Court has long recognized the authority of FERC and its predecessor, the Federal Power Commission, to regulate the interstate transportation of gas directly to end-users. In *United Gas Pipe Line v. FPC*, 385 U.S. 83, 89 (1966), this Court observed that the NGA vests the Commission with jurisdiction over interstate transportation of natural gas "whether the *transportation* is *for hire* or for sale and whether the *sale* is *for consumption* or resale"

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tion to regulate the transaction at issue here. In *Michigan Consolidated Gas Co.*, 887 F.2d at 1300, 1302, the Sixth Circuit—agreeing with the court of appeals that the transaction was within FERC's jurisdiction over interstate transportation—concluded that "the Panhandle-National Steel bypass involves only the interstate transportation of natural gas, and * * * the Act preempts MPSC [Michigan Public Service Commission] regulation over the bypass." The petitioners in this case have also sought further review of the Sixth Circuit's judgment by means of a petition (No. 89-1160) filed on the same day as this one. Though not a party to that action, FERC participated as an amicus curiae in the Sixth Circuit; it argued that the NGA preempted state regulation.

The court in this case noted that the issue of preemption was "not the subject of the present petition for review." Pet. App. 10a.

(emphasis added). See also *FPC v. Transcontinental Gas Pipe Line Corp. (Transco)*, 365 U.S. 1 (1961); *FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950); *Panhandle Eastern Pipe Line Co. v. FPC*, 359 F.2d 675 (8th Cir. 1966).

In *Transco*, this Court upheld a decision by the Commission denying a certificate of public convenience and necessity for the interstate transportation of gas purchased by a New York utility in Texas. While the Court noted that the "direct" sale did not fall within the Commission's jurisdiction over interstate sales, the transaction was subject to the Commission's jurisdiction insofar as the Act "requires the Commission to certificate the transportation of gas pursuant to the sale." 365 U.S. at 4.[1] The Court further held that in exercising that jurisdiction, the Commission could take account of the end use of the gas, the "preemption of pipeline facilities," and the effect of the transaction on prices. *Id.* at 31. The transaction at issue in this case, like that in *Transco*, involves transportation for hire. Here, as in *Transco*, the pipeline sought authorization to transport gas to be purchased by an end-user in one state and to be consumed by that end-user in another state. Thus, *Transco* necessarily indicates that the Commission has jurisdiction in this case; indeed, *Transco* underscores the Commission's responsibility to consider a broad range of issues relevant to the public interest.

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[1] Under Section 1(b) of the NGA, the Act applies to "the sale in interstate commerce of natural gas *for resale for ultimate public consumption for domestic, commercial, industrial, or any other use*" but not to "any other * * * sale of natural gas * * * " (emphasis added). As is discussed further below, the limitation on the Commission's jurisdiction to regulate *sales* of natural gas does not qualify its separate jurisdiction to certificate the interstate *transportation* of gas.

not just those relating to transportation as such, when it is asked to certify interstate transportation.

In *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), this Court again emphasized the breadth of the Commission's jurisdiction over the interstate transportation of gas. In that case, a pipeline that experienced shortages of natural gas sought approval of a plan to curtail deliveries to all of its customers, including direct-sale customers. One direct-sale customer argued that the Commission had no jurisdiction to oversee such sales. This Court rejected that contention, holding that the Commission could rely upon its jurisdiction over interstate transportation. After referring to the three heads of Commission jurisdiction (interstate transportation, sales in interstate transportation for resale, and natural gas companies engaged in such transportation or sales), the Court emphasized:

> Each of these is an independent grant of jurisdiction and, though the Act's application to "sales" is limited to sales of interstate gas for resale, the Act applies to interstate "transportation" regardless of whether the gas transported is ultimately sold retail or wholesale.

Id. at 636.

As the court of appeals noted in this case, "[t]he arrangement in dispute involves merely interstate transportation of natural gas, a subject matter clearly within the Commission's jurisdiction." Pet. App. 9a.

2. Contrary to petitioners' contention (Pet. 9-13), there is no inconsistency between that conclusion and this Court's decisions in *Panhandle Eastern Pipe Line Co. v. Michigan Public Serv. Comm'n* (*Pan-*

handle Michigan), 341 U.S. 329 (1951), and *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n of Indiana* (*Panhandle Indiana*), 332 U.S. 507 (1947). In both those cases, the Court held that a State's regulation of sales by interstate pipelines to direct-users in that State is not preempted by either the Natural Gas Act or the Commerce Clause. The Court did not purport to address the question presented by this case, which is whether the Commission has jurisdiction over the interstate *transportation* of natural gas to a direct-user from a field where it has been purchased by that user. Indeed, in *Transco*, this Court found that there was no conflict between the Act's reservation of state authority over rates charged in retail gas sales—the authority recognized in *Panhandle Michigan* and *Panhandle Indiana*—and federal authority over transportation of the interstate gas. See 365 U.S. at 27-28.

Petitioners complain that recognition of the Commission's jurisdiction over the interstate transportation of gas to National Steel places "form over substance" and "allow[s] for the usurpation of state authority." Pet. 12. More particularly, they contend that the exercise of Commission jurisdiction "effectively authorizes the FERC to engage in the review of the propriety of intrastate rates and rate designs which are the exclusive province of the State commissions." Pet. 13. Substantially similar arguments were rejected by this Court in the *Louisiana Power* and *Transco* cases where the Court held that Congress, by enacting the NGA, intended "to impose a comprehensive regulatory system on the transportation, production, and sale" of natural gas. *Transco*, 365 U.S. at 28; *Louisiana Power*, 406 U.S. at 641. Where, as here, comprehensive control over interstate transpor-

tation is beyond the competence of state authorities, "the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation." *Transco*, 365 U.S. at 28; *Louisiana Power*, 406 U.S. at 641.

3. Petitioners cannot contend that there is any conflict among the circuits with respect to the jurisdiction of the Commission over transportation for hire by an interstate pipeline of interstate gas to an industrial end-user. To the contrary, the D.C. Circuit and the Sixth Circuit have agreed that transportation by Panhandle of National Steel's gas from Oklahoma to National Steel's plant in Michigan is interstate transportation and is not "local distribution" within the meaning of Section 1(b) of the NGA. Pet. App. 8a-10a; *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1300 (6th Cir. 1989), petition for cert. pending, No. 89-1160 (filed Jan. 24, 1990).[5]

Petitioners argue in both cases that, even if the transportation of natural gas by Panhandle from Oklahoma to Michigan is not "local distribution," the construction of facilities to deliver that gas to National Steel in Michigan is subject to state regulation.

[5] The Tenth Circuit has also had before it the issue of FERC's exclusive jurisdiction over transportation for hire of interstate gas directly to an end-user. See *Williams Natural Gas Co. v. City of Oklahoma City*, 890 F.2d 255 (1989). FERC participated as amicus curiae in that case and urged that its jurisdiction was exclusive. The Tenth Circuit held that FERC's order must be challenged in the petition for review pending before the court of appeals for the District of Columbia Circuit. A petition for a writ of certiorari to the Tenth Circuit was filed February 12, 1990 (No. 89-1296).

because it is necessary to accomplish the "local distribution" of the gas, not its interstate transportation. See Pet. 11; 89-1160 Pet. 8. Petitioners' truncated view of "interstate transportation" ignores this Court's directive that the line drawn by Congress between federal and state jurisdiction in this area is "clear and complete." *Panhandle Indiana*, 332 U.S. at 517; see 15 U.S.C. 717f(c) (requiring FERC certificate of public convenience and necessity for construction or extension of facilities for interstate transportation, as well as for interstate transportation itself, of natural gas). The result reached by the court of appeals here, as by the Sixth Circuit, properly preserves a clear division between state and federal authority.

4. "Bypass" transportation cases such as this one raise fact-specific issues that require the balancing of competing concerns such as the federal interest in furthering competition in natural gas markets and state interests in subsidizing residential natural gas consumers by means of charges to industrial end-users. The court of appeals in this case determined that FERC's decision to certificate the proposed service was supported by substantial evidence and was not arbitrary or capricious. Pet. App. 15a. Petitioners have not challenged that holding. The reasonableness of the authorization of the transportation bypass is therefore not before this Court.

CONCLU

The petition for a writ
denied.

Respectfully submitted.

Jo

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MARCH 1990

* The Solicitor General is disq

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